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# A Half-hearted Invitation: Welcoming Sexual Harassment in Minnesota

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## A HALF-HEARTED INVITATION: WELCOMING SEXUAL HARASSMENT IN MINNESOTA

Margaret Moore Jackson<sup>†</sup>

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Such welcome and unwelcome things at once  
'Tis hard to reconcile.<sup>1</sup>

To grant woman an equality with man in the affairs of life is contrary to every tradition, every precedent, every inheritance, every instinct, and every teaching. The acceptance of this idea is possible only to those possessing an especially progressive tendency and a strong sense of justice, and it is yet too soon to expect these from the majority.<sup>2</sup>

## I. INTRODUCTION

Much has been written about the history of progressivism,<sup>3</sup> its varied and sometimes contradictory meanings,<sup>4</sup> and the philosophical,<sup>5</sup> political,<sup>6</sup> and legal<sup>7</sup> movements identified as being progressive. Although the term is ubiquitous in certain circles of the American political left,<sup>8</sup> it is not commonly used in the national

1. WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 4, sc. 3.

2. 4 HISTORY OF WOMAN SUFFRAGE xiii–xxxiii (Susan B. Anthony & Ida Husted Harper eds., 1902).

3. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) (examining the rise of the progressive movement and its challenge to social and economic inequality); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493 (1996) (reviewing NEIL DUXBRY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)).

4. See ALAN FREEMAN, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 285 (David Kairys ed., 3d ed. 1998).

5. See, e.g., J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 542–54 (2004).

6. See Editorial, *On the Move*, THE NATION, June 26, 2006, at 3.

7. Robin L. West has contributed an immense amount of scholarship in this area. See, e.g., ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* (2003) [hereinafter WEST, *RE-IMAGINING JUSTICE*]; Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 678–79 (1990) [hereinafter West, *Constitutionalism*].

8. In particular, the people and groups who seek policies more leftist than the current Democratic party is willing to prioritize often self-identify as progressives. See, e.g., The American Prospect, *History and Mission*, <http://www.prospect.org/web/page.wv?name=About+Us&section=root> (last visited Nov. 1, 2006) (“Our conservative counterparts have played a critical role in pulling the

public policy discourse or the mainstream media.<sup>9</sup> Some commentators question whether American progressivism has ceased to exist in any significant way.<sup>10</sup>

Without attempting to reconcile these rich areas of inquiry, this article explores whether continuing progressive vitality is revealed in the interpretation of one problematic aspect of sexual harassment law in Minnesota. First, this article briefly identifies what are usually considered progressive ideals and how those goals have been translated into laws impacting sexuality, women's rights, and sexual harassment.<sup>11</sup> Next, it explores what progressive *should* mean in the context of a vital requirement in proving workplace sexual harassment—that the complained-of conduct was unwelcome.<sup>12</sup> Then, it analyzes the extent to which, in its treatment of this area of the law, Minnesota fulfills its promise as a progressive state.<sup>13</sup>

## II. PROGRESSIVE INTERPRETATION OF UNWELCOMENESS – WHAT WOULD IT LOOK LIKE?

### A. Defining “Progressive” Ideals, Goals, Laws

In general, progressive ideas, policies, and movements are founded on the notion that society can be improved by moving beyond established tradition. Progressive theories advocate trying new ways to counteract social and economic inequality.<sup>14</sup> In

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entire national debate to the right. We intend to take it back.”); Center for American Progress, The Progressive Priorities Series, <http://www.americanprogress.org/projects/progressivepriorities/> (last visited Nov. 1, 2006) (series of papers promoting “progressive priorities” that include universal health insurance and reducing payroll taxes in favor of restructured income taxes).

9. Rather, discussions of politics in the mainstream American media are usually limited to the liberal-versus-conservative dichotomy.

10. See Robert Justin Lipkin, *Is American Progressive Constitutionalism Dead?*, 4 WIDENER L. SYMP. J. i, i (1999) (“[N]either the United States Congress nor the Supreme Court has been decidedly progressive for at least twenty-five years, if ever at all. . . . [T]he future appears unlikely to contain a truly progressive judiciary. . . . Similarly, progressivism is no longer represented in the Congress, nor is it anything but a forgotten voice in American constitutional and political culture.”).

11. See *infra* Part II.A.

12. See *infra* Part II.B–C.

13. See *infra* Part III.

14. See, e.g., James M. Caponi, *Can't We Get Along?: Progressive Constitutionalism and the Struggle for Existence and Understanding Within the New Federalism*, 4 WIDENER L. SYMP. J. 429, 443 n.81 (1999) (citing West, *Constitutionalism*, *supra* note 7, at 643 (noting that progressives view the Constitution as a mechanism for challenging

response to the hierarchical effects of capitalism, progressives tend to seek governmental standards to ensure a level of fairness and equality that the unrestricted market cannot be relied upon to provide.<sup>15</sup>

From the progressive point of view, government is an instrument of good.<sup>16</sup> Modern progressives seek governmental action to construct social policies that provide power to the otherwise disenfranchised.<sup>17</sup> The belief is that government intervention ensures fairness for ordinary people against the power of big business, entrenched interests, and the privileged classes.<sup>18</sup> As a result, economic policies considered progressive tend to favor lower-status and lower-income persons.<sup>19</sup>

But society cannot achieve such fairness without fundamental, sometimes unsettling, change. Because the traditional social structure is believed to preserve power in the established elite, progressives favor efforts to disrupt the existing social hierarchy and move toward the goal of social equality.<sup>20</sup> Typically, these

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entrenched social and economic inequality)); Hill, *supra* note 5, at 547–48 (“[P]rogressives argue that total social freedom can be expanded by adjusting (or equalizing) societal conditions to promote greater freedom of choice among individuals.”); Michelle McGovern, *A Progressive Perspective on Pronography* [sic]: *American Booksellers Association v. Hudnut*, 4 WIDENER L. SYMP. J. 451, 470 (1999) (quoting Justice Brandeis as advocating progressive social and economic experimentation by state legislatures); Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1101 (2004) (arguing that progressive taxation justifiably redistributes wealth to reduce economic disparity).

15. Center for American Progress, <http://www.americanprogress.org/aboutus> (last visited Nov. 1, 2006) (statement of purpose from the Center for American Progress indicating, among other things, that making America a country of boundless opportunity “will only be achieved with an open and effective government that champions the common good over narrow self-interest, harnesses the strength of our diversity and secures the rights and safety of its people”)

16. J. LEONARD BATES, *THE ORIGINS OF TEAPOT DOME: PROGRESSIVES, PARTIES, AND PETROLEUM, 1909–1921* 1 (1963).

17. See West, *Constitutionalism*, *supra* note 7, at 678–79.

18. BATES, *supra* note 16, at 2.

19. For example, the IRS Glossary defines “progressive tax” as “[a] tax that takes a larger percentage of income from high-income groups than from low-income groups.” Internal Revenue Service, Glossary, [http://www.irs.gov/app/understandingTaxes/jsp/tools\\_glossary.jsp](http://www.irs.gov/app/understandingTaxes/jsp/tools_glossary.jsp) (last visited Nov. 1, 2006). “Regressive tax” is defined as “[a] tax that takes a larger percentage of income from low-income groups than from high-income groups.” *Id.* For an in-depth discussion of progressive tax policy, see Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793 (2005).

20. West, *Constitutionalism*, *supra* note 7, at 679.

efforts have been focused on economic empowerment, with the idea that those who perform the work of the society should be entitled to receive the benefits of the society.<sup>21</sup>

Justification for government-mandated social change is grounded sometimes in the moral imperatives of justice and equality.<sup>22</sup> Sociologist Fred Block cites the effort to inhibit the unrestrained power of big business as one of the great popular movements designed to connect economic and political institutions with “our deepest moral commitments.”<sup>23</sup> Block argues that to gain support for their ideas in the current political climate, progressives must develop a narrative describing a “moral economy,” where the government moderates otherwise selfish individual goals to achieve the objective of a moral society.<sup>24</sup>

A brief comparison to general notions of conservative ideology further clarifies our definition of progressive. One criticism of the conservative political doctrine is that its adherence to tradition inhibits the potential for positive change.<sup>25</sup> Conservatives trust

21. See William J. Maakestad & Charles Helm, *Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives That Influence Employer Decisions to Control Occupational Hazards*, 17 N. KY. L. REV. 9, 17–18 (1989) (describing progressive advocacy for workers compensation programs in the U.S.); Molly S. Mcusic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1344–45 (1997) (listing progressive workplace reforms and critiquing the implicit model of the universal white male worker, whose wife was expected to work at home or serve as a second-class employee). For an example of more recent progressive workplace reform efforts, see Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 492–93 (2001) (advocating community economic development through legal advocacy for living wage ordinances and other policies that improve the economic conditions of low-income workers).

22. Some authors argue that a connection to religious-based moral imperatives is required for progressives to impact social and political discourse. Eric Alterman, *With God on Our Side?*, THE NATION, Mar. 20, 2006, at 10. “American progressive reform has never advanced without a moral awakening entangled with notions about what the Lord would have us do.” *Id.* A discussion of religious doctrine concerning the place of women in society and treatment of sexuality is, however, beyond the scope of this article.

23. Fred Block, *A Moral Economy: To Seize the Political Moment, Democrats Need a Better Narrative*, THE NATION, Mar. 20, 2006, at 19.

24. *Id.* at 18.

25. Kevin Drum, *Political Animal*, WASH. MONTHLY, [http://www.washingtonmonthly.com/archives/individual/2004\\_03/003574.php](http://www.washingtonmonthly.com/archives/individual/2004_03/003574.php) (Mar. 29, 2004, 15:10 EST) (“Conservatives, almost by definition, are absorbed by the past.”). Others argue that deference to tradition is good for democracy. GILBERT K. CHESTERTON, *ORTHODOXY* 85 (1908) (“Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen

neither current political actors nor social consensus, rather they advocate adherence to time-tested social and legal structures that are immune from the whims of the majority.<sup>26</sup> For conservatives, the collective wisdom of generations is far more reliable and desirable than the conclusion of any one modern individual.<sup>27</sup> As such, they seek to conserve the status quo in society and in the law (or at least how they perceive it).<sup>28</sup> This means preserving the institutions and social structures that generated the entrenched principles they value.<sup>29</sup>

From a conservative perspective, the value of law lies in its ability to preserve the established social structure by means of rules governing human behavior.<sup>30</sup> Conservative goals promoted by regulating behavior might include promoting “public peace for the benefit of the entire community.”<sup>31</sup> Social rules enforced by law support the institutions (fatherhood, maternity, inheritance) and identities (fathers, children) that promote stability and predictability of the past.<sup>32</sup> By maintaining the social order through direct reference to the past, the likelihood of upheaval and conflict is seen as lessened.<sup>33</sup>

Progressives, in contrast, seek laws that facilitate change from existing tradition. They see conflict and upheaval as necessary risks warranted by the benefits of a more just society. Law provides the power to enable a society to move beyond the inertia of tradition, moderating the selfish impulses of human behavior to improve the conditions of the society overall.

Progressivism, however, shares some aspects of conservative ideology. Both conservatives and progressives believe that government should create structures that promote (their view of) an ideal society.<sup>34</sup> Both progressives and conservatives view the

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to be walking about.”).

26. West, *Constitutionalism*, *supra* note 7, at 652–54.

27. *Id.*

28. *Id.*

29. *Id.*

30. WEST, RE-IMAGINING JUSTICE, *supra* note 7, at 168 (describing the “moral point” of law according to conservative jurisprudence).

31. Dana Neacsu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601, 604 (2003).

32. WEST, RE-IMAGINING JUSTICE, *supra* note 7, at 167–68.

33. Neacsu, *supra* note 31, at 604 (identifying the promotion of “public peace for the benefit of the entire community” as a goal of conservatives).

34. Frank Michelman, *What (If Anything) is Progressive – Liberal Democratic Constitutionalism?*, 4 WIDENER L. SYMP. J. 181, 198–99 (1999).

judiciary as incapable of neutrality.<sup>35</sup> As a result, they share the belief that judicial decisions based on the Constitution are necessarily affected by the political process.<sup>36</sup> Where conservatives and progressives completely diverge is in their ultimate goals: progressives seek state actions that upset the structure of social hierarchy, while conservatives favor state actions that preserve patterns derived from the established social structure.<sup>37</sup>

### 1. *Sexuality*

Whereas progressive efforts once focused on promoting economic and social justice, the quest for this type of change has resonated little with the general public during recent decades.<sup>38</sup> As a result, other goals have been moved to the progressive forefront. At least one author has opined that “in a society in which the quest for socio-economic equality has come to a halt, sexual equality seems to represent the most progressive goal that one can reach.”<sup>39</sup>

Progressive treatment of sexual issues seeks legal protection for what many consider individual rights against government regulation.<sup>40</sup> These relatively recent developments in the law limit government intrusion on personal choices regarding intercourse, contraceptives, masturbation, abortion, and familial living arrangements.<sup>41</sup> It is argued that enlarging the areas in which the government cannot impede sexual decision making promotes

35. West, *Constitutionalism*, *supra* note 7, at 644.

36. *Id.*

37. *Id.* at 679.

38. Neacsu, *supra* note 31, at 652–53.

39. *Id.* at 603. The author categorizes the opposing movements favoring legal regulation of sexuality as “permissive individual rights” (progressive) and “repressive legislation” (conservative). *Id.* at 613.

40. *See id.* at 603 (identifying the right to engage in contraceptively protected intercourse with one’s spouse as among the “new individual rights with a sexual content”).

41. *See id.*, at 603 n.9 (citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (nonnuclear family living arrangements); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438, (1972) (nonprocreative contraceptive nonmarital intercourse); *Stanley v. Georgia*, 394 U.S. 557 (1969) (masturbation); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (nonprocreative marital intercourse); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreative marital intercourse); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (intercourse in a secluded automobile)). *See also* William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 640 (discussing the history and evolution of the jurisprudence of sodomy laws in the United States).



greater tolerance and a more democratic society.<sup>42</sup> Conversely, efforts to restrict and regulate sexuality generally are considered “conservative.”<sup>43</sup> Laws that impose sexual abstinence, criminalize obscenity, and restrain sexual expression fall on the anti-progressive end of the scale.<sup>44</sup>

## 2. *The Rights of Women*

Legal developments that identified and protected individual rights in the area of sexual autonomy are especially significant to women, who have been subject to more cultural and governmental intrusion than men. In the same progressive spirit, laws forbidding gender discrimination are intended to create social change by alleviating the unequal treatment of women in the workplace and in society as a whole.<sup>45</sup> Because traditional power structures have marginalized and subordinated women,<sup>46</sup> society identifies progressives as those who support policies and legislation that promote women’s rights.<sup>47</sup> The underlying theory is that the law should play a role in reforming cultural biases that perpetuate inequality.<sup>48</sup> By imposing rules that aim to dismantle the effects of social injustice and interpreting the law in a manner that refuses to countenance harmful biases of the past, the law promotes justice.<sup>49</sup>

42. Neacsu, *supra* note 31, at 603.

43. *Id.* at 604 (“Conservatives, on the other hand, have used sexually-oriented legislation to create a chimera of social order and predictability.”).

44. *Id.* (cataloging such legislation as conservative).

45. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001) (stating that the purpose of Title VII is to eliminate discrimination in employment and “to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce”).

46. See, e.g., CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 116–18 (2005) (“No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live.”).

47. See Rafael Chodos, *Protecting the Righteous Employer Against Abusive Sexual Harassment Claims: Two Modest Proposals*, 18 AM. J. TRIAL ADVOC. 565, 573–74 (1995) (describing Title VII as arising from progressive forces of the 1960s that sought to end discrimination against women in the workplace through legislation). See also Katha Politt, *Regressive Progressive*, THE NATION, May 27, 2002, at 10 (excoriating then-President candidate Dennis Kucinich for being a much-touted progressive candidate with an anti-progressive voting record on abortion rights).

48. See Jane H. Aiken, *Protecting Plaintiffs’ Sexual Pasts: Coping With Preconceptions Through Discretion*, 51 EMORY L.J. 559 (2002) (noting the enactment of rules of evidence meant to overcome disfavored preconceptions).

49. See West, *Constitutionalism*, *supra* note 7, at 693 (delineating progressive constitutional interpretation of the equal protection clause as aimed at “correcting maldistributions of social power, wealth, and prestige” and “a tool for dismantling

Actual changes in social views are hoped to follow.<sup>50</sup>

There is not, however, always a clear consensus on which laws and underlying doctrine actually effect the desired social changes. Some criticize the development of a legal equality doctrine that begins with an assessment of whether or not the woman is “similarly situated” to the man as a standard that permits continued discrimination based upon socially perceived differences between men and women.<sup>51</sup> While legal treatment of women has improved, many commentators argue that the law continues to validate women’s subordination.<sup>52</sup>

Similarly, efforts of the early Progressive Movement to improve the status of women are viewed as causing contradictory effects. Leaders pushed for enhancements of women’s legal rights, including the right to vote and improvements in employment opportunities.<sup>53</sup> While these advocates sought legislation protecting both male and female workers from employer abuses, they also tended to support special protections for female employees.<sup>54</sup> Unfortunately, the creation of special laws that

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society’s racist, misogynist, homophobic, patriarchic, and economic hierarchies”).

50. See Chodos, *supra* note 47, at 573–74 (noting that 1960s antidiscrimination and affirmative action legislation were promoted by the notion that “the results of bad attitudes,” i.e., workplace discrimination, “had to be extirpated and that legislation was a good way to extirpate them”). Chodos, who critiques sexual harassment law as unfair to employers, goes on to characterize the era as “when the law began to subscribe enthusiastically to the notion that we can raise the consciousness of offenders by lightening their pockets.” *Id.* at 574.

51. See Nadine Taub & Elizabeth M. Schneider, *Women’s Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151 (David Kairys ed., rev. ed. 1990) (conceding that Equal Protection doctrine has made some progress toward eliminating sex discrimination, but criticizing “the legal ideology of equality” for legitimizing differential treatment).

52. Diane Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 294, 297 (David Kairys ed., 1982) (“Over the past century, the legal system has rejected some of its most blatant sexist notions and expressions without ceasing to reinforce male power and female subordination.”).

53. See, e.g., ROBERT M. LA FOLLETTE, *LA FOLLETTE’S AUTOBIOGRAPHY: A PERSONAL NARRATIVE OF POLITICAL EXPERIENCES* 311–18 (1913). La Follette gushed over the intelligence of women in his family in an apparent effort to establish why he believed women to be capable of providing wise counsel on political and legal matters. *Id.* at 312–14. La Follette promoted increased participation of women in public life by appointing them to state executive positions and supporting women’s suffrage. *Id.* at 314–18.

54. Joan Hoff, *Women and the Constitution*, in *THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AND ESPECIALLY SOCIALIST CRITICISM* 239–40 (Bertell Ollman & Jonathan Birnbaum eds., 1990) (“Progressive women’s ideology and goals are also difficult to appreciate today because they seem contradictory and

applied only to women reinforced stereotypes that justified discriminatory treatment of women, particularly in the workplace. Another criticism of the movement for special protections is that it disempowered women by reinforcing their traditional roles. Implementation of such special protections connoted that women were fragile, submissive, and in need of safeguarding.<sup>55</sup> The justification for these protections placed an inordinate emphasis on women's capacities to reproduce, focusing on this essential aspect of womanhood over any differences that individual women might have.<sup>56</sup> This rationale articulated motherhood as the primary role of all women.<sup>57</sup>

As a result, laws that effectively restricted women to lower-paying, lower-prestige jobs were justified because of the childbearing function that society assumed all women had. Moreover, lawmakers used the physical demands of childbearing and the relative frailty of women as a further basis for restricting women in the workplace. They relied upon the demands of motherhood without regard for whether individual women in fact were or intended to become mothers.<sup>58</sup> Lawmakers also assumed

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ambiguous. On the one hand, Progressive women explicitly committed themselves to women's rights – the right to equal political participation and to the opportunity for meaningful, productive, and well-paid work. On the other hand, the very same women successfully established legal constraints on women's rights in the work place.”).

55. *Id.* at 239 (stating that both the idea and the actuality of special legislation for women workers “strengthened sexual segregation and stratification patterns in the labor market . . . were based on the assumption that women would always be cheap, temporary, unskilled labor . . . [and] helped define patterns of discrimination against female wage-earners, limited women's economic opportunities, and reinforced stereotypic notions of women as frail, passive, and dependent.”).

56. *Id.* See also, e.g., *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 494 U.S. 1055 (1990) (upholding employer policy that all women of childbearing age, regardless of whether they intended to have children, were prohibited from employment in a battery manufacturing plant to protect their potential fetuses from lead poisoning).

57. See Taub & Schneider, *supra* note 51, at 164–65 (describing the Supreme Court's upholding a statute that forbade employment of women for more than ten hours per day in a laundry in *Muller v. Oregon*, 208 U.S. 412 (1908)).

58. The perception that all women are by default potential mothers has never been eliminated. A recent Centers for Disease Control and Prevention report has been characterized as urging today's women to act like they are always pregnant, regardless of whether they intend to become pregnant. January W. Payne, *Forever Pregnant Guideline: Treat Nearly All Women as Pre-Pregnant*, WASH. POST, May 16, 2006, at F1. The report itself focused, among other things, on the need for health insurance and health care to be made available to the lower-income and minority

that women were weaker, without considering that some women might be physically vigorous or that some men were less physically capable than some women, thus “bolster[ing] a highly traditional and restrictive definition of woman’s role in society generally as well as in the workplace.”<sup>59</sup>

Tensions between the goals, means, and effects of the laws intended to alleviate gender inequity continue to be noted throughout the legal terrain. Developments that some herald as advancing women’s status in society are savaged by others. For example, commentators disagree on the progressive nature or social benefits of laws designed to facilitate equality by forbidding discrimination,<sup>60</sup> regulating pornography,<sup>61</sup> or criminalizing prostitution<sup>62</sup> and statutory rape.<sup>63</sup>

### 3. *Sexual Harassment Law*

The relatively recent addition of sexual harassment law to the

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women who are most in need of pre-pregnancy assistance and contraceptive planning. *Recommendations to Improve Preconception Health and Health Care – United States*, MORBIDITY AND MORTALITY WKLY. REP. (Centers for Disease Control and Prevention), Apr. 21, 2006 at 11, 13–14. These guidelines are troublesome in their potential to be used to justify prosecution of women for engaging in conduct that harms their fetuses. Moreover, the guidelines ignore the fact that not all women are potential (biological) mothers, including those without fully functioning reproductive systems and those who do not have sex with men.

59. Hoff, *supra* note 54, at 239.

60. For a summary of the feminist debate concerning formal equality versus substantive equality, see Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1068–71 (1999).

61. See Dana A. Fraytak, *The Influence of Pornography on Rape And Violence Against Women: A Social Science Approach*, 9 BUFF. WOMEN’S L.J. 263, 274–75 (2001) (outlining debate as to whether anti-pornography laws advance or undermine women’s rights and progressive causes); Carlin Meyer, *Sex, Sin, and Women’s Liberation: Against Porn Suppression*, 72 TEX. L. REV. 1097, 1101 (1994) (arguing that efforts to suppress pornography enable censorship of progressive ideas and legal restrictions on women’s sexuality). See also NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN’S RIGHTS* (1st ed. Scribner, 1995). [Editor’s Note: See Strossen’s article in this issue: Nadine Strossen, “Is Minnesota Progressive?” *A Focus on Sexually Oriented Expression*, 33 WILLIAM MITCHELL L. REV. 51 (2006).]

62. See Gregg Aronson, Note, *Seeking a Consolidated Feminist Voice for Prostitution in the US*, 3 RUTGERS J.L. & URB. POL’Y 357 (2006) (discussing three competing schools of feminist thought concerning prostitution).

63. See Michelle Oberman, *Girls in the Master’s House: Of Protection, Patriarchy and the Potential for Using the Master’s Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 803–07 (2001) (describing feminist advocacy for, and critique against, statutory rape laws).

gender equality arsenal has provoked similar debate. Sexual harassment law was constructed using the anti-discrimination framework to curb behaviors once seen as normal, natural, and innocuous.<sup>64</sup> These laws broke from traditional acceptance of this type of discrimination by identifying new rights.<sup>65</sup> The intent was not so much to facilitate litigation or provide a remedy, as to modify the ways in which people interacted in the workplace.<sup>66</sup> The creation of a government-sponsored ban on sexual harassment at work provides an example of progressive regulation of selfish impulses in order to improve conditions for society as a whole.<sup>67</sup>

The laws protecting employees from having to endure sexual harassment in the workplace represent a progressive effort to empower two traditionally marginalized groups—employees, and, in particular, women employees. In keeping with progressive ideals, these laws impose the burden of taking steps to eliminate such conduct upon employers.<sup>68</sup>

Many commentators believe that, despite the failure to achieve sexual equality in the workplace and in society, sexual harassment law serves as an example of successful progressive advocacy.<sup>69</sup> Others argue, however, that conservatives co-opted sexual harassment law to serve their goals of reinforcing women's subordination.<sup>70</sup>

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64. See David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment*, 81 CORNELL L. REV. 66, 110–11 (1995) (describing cases in the early 1970s where federal courts rejected efforts to articulate sexual harassment claims as outside the scope of Title VII).

65. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (stating that Title VII provides employees the “right to work in an environment free from discriminatory intimidation, ridicule, and insult”).

66. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (stating that Congress intended to remove “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification”).

67. See Block, *supra* note 23, at 19.

68. See L. Robert Guenther, III, *Who is the Victim Here?: Vicarious Sexual Harassment After Leibovitz v. New York City Transit Authority*, 55 WASH. U.J. URB. & CONTEMP. L. 299, 302 n.12 (“The notion that employers are the ones best suited to bear the costs of sexual harassment in the workplace, rather than the victim, is a progressive social statement that tells employers they must do the right thing and take proactive steps to limit and remove this problem from the workplace.”).

69. See, e.g., MACKINNON, *supra* note 46, at 162–79.

70. Some commentators argue that sexual harassment law has gone too far in seeking to eliminate harassment. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 782 (2006) (citing Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003)). See also Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) (arguing that Title VII

*B. Exemplifying “Regressive” – The Requirement of Unwelcome Conduct*

The framework of sexual harassment law’s prima facie case incorporates among its criteria that a complaining employee must establish that the offending conduct was unwelcome.<sup>71</sup> This element, when contested by defendants, shifts the focus of the inquiry from the wrongful conduct engaged in by the defendant to the allegedly inviting behavior of the plaintiff. The case then centers on whether she<sup>72</sup> welcomed the harassment by behaviors such as failing to complain after it occurred, maintaining some type of relationship with the harasser, or engaging in any sexually related talk or behavior, whether at work or on her own time.<sup>73</sup>

This element of a prima facie case is widely seen as detrimental to the progressive cause of changing society to improve the perception, status, and actual lives of women.<sup>74</sup> Requiring women who complain of workplace harassment to prove the conduct was demonstrably<sup>75</sup> unwelcome harkens back to traditional, disempowering assumptions about women’s roles, including the assumption that women who work outside the home may be sexually available unless they expressly indicate otherwise.<sup>76</sup>

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promotes the conservative agenda by restricting sexuality in the workplace); Neacsu, *supra* note 31, at 651 (arguing that sexual harassment law has facilitated “anti-sexual hysteria” that discredits sexual expression and reaffirms the traditional notion of sex as subordinating and exploiting women).

71. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (stating the frequently repeated maxim that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’”).

72. Since sexually harassed employees and sexual harassment plaintiffs are overwhelmingly female, this article will refer to the victim as “she” and “her” throughout.

73. See Elsie Mata, *Title VII Quid Pro Quo and Hostile Environment Sexual Harassment Claims: Changing the Legal Framework Courts Use to Determine Whether Challenged Conduct is Unwelcome*, 34 U. MICH. J.L. REFORM 791, 830 & nn.224–27 (noting courts’ consideration of plaintiffs’ sexual conversations, fantasies, and histories, at and away from work, as relevant to determining unwelcomeness).

74. A number of commentators have criticized the theory and practice of unwelcome conduct inquiries. See, e.g., Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125, 174 (1995); Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451 (1992); Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 626–28 (1997).

75. Proof of unwelcomeness focuses on what the harasser did, not what she may have felt about it.

76. See Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1243–47 (1999) (connecting the “stereotypical notion that a working woman was sexually available” with the evidence of a

*C. Progressive Treatment of Unwelcomeness – Undermining Bias and Promoting Justice*

Twenty years have passed since the Supreme Court first recognized hostile environment sexual harassment as a legitimate claim in *Meritor Savings Bank v. Vinson*,<sup>77</sup> but women continue to experience these types of inequitable working conditions.<sup>78</sup> The goal of eliminating workplace harassment remains unfulfilled despite the availability of legal action. Recent studies show a large percentage of women still encounter sexual harassment at work.<sup>79</sup> Most women do not sue.<sup>80</sup> The unwelcomeness element disadvantages women who do seek to enforce their right to a workplace free of sexual harassment.<sup>81</sup> By reinforcing assumptions about sexuality and power without open examination, the framework permits men to continue asserting that women invited their sexual conduct or overtures.<sup>82</sup> Progressive trends in the interpretation of this element could help mitigate the tendency to reinforce traditional gender stereotypes and inequalities.

A progressive take on the unwelcomeness element is to eliminate the requirement altogether, an idea proposed by

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complainant's provocative speech and dress approved as relevant to the welcomeness determination by *Meritor*).

77. 477 U.S. 57, 73 (1986).

78. See Heather Antecol & Deborah Cobb-Clark, *The Changing Nature of Employment-Related Sexual Harassment: Evidence from the U.S. Federal Government, 1978–1994*, 57 INDUS. & LAB. REL. REV. 443, 443–45 (2004) (citing studies concluding that half of all women experience sexual harassment at some point during their working lives). Over ninety percent of reported cases involve men harassing women. DEBORAH L. RHODE, *SPEAKING OF SEX, THE DENIAL OF GENDER INEQUALITY* 97 (1997).

79. Mata, *supra* note 73, at 824–25 nn.193–95 (noting that sexual harassment in employment “remains widespread, even epidemic, yet underreported”).

80. Only a small percentage of women who experience workplace sexual harassment initiate formal claims. See, Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Chances of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67, 68 (1999) (citing surveys conducted in 1981, 1988, and 1994 showing that forty-two percent to forty-four percent of female federal employees report legally actionable conduct, while only seven percent file formal claims).

81. See Mata, *supra* note 73, at 793–94 (criticizing the current analysis of unwelcome conduct as unfairly perpetuating stereotypes about women and placing plaintiffs at a disadvantage during litigation).

82. Kimberlé Crenshaw, *Whose Story is it Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 427 (Toni Morrison ed., 1992)).

numerous commentators.<sup>83</sup> Since unwelcome conduct is a major, if not essential, component of sexual harassment doctrine, ceasing to recognize it as a requirement would constitute a major departure from tradition and precedent. Another suggested approach is to remove the inquiry as an element of a plaintiff's prima facie case and reconfigure it as an affirmative defense that defendants would have the burden to establish.<sup>84</sup>

A less radical alternative would be to interpret the unwelcomeness standard in a manner that recognizes the need to overcome biased traditional attitudes, to promote equality in the workplace, and to improve the delivery of justice to the less-empowered member of our society. This interpretation would explicitly take issue with the inherent assumptions that bind women to the roles society required them to play in the past. Two particular means of dealing progressively with the unwelcomeness requirement would fit within this rubric: establishing formal, protective rules similar to the civil "rape shield" provided by Federal Rule of Evidence 412, and interpreting all proffered evidence of unwelcomeness in ways that reframe and reform stereotypes about women's roles and permissible behavior. Each of these two efforts, discussed below, would incorporate the progressive values of facilitating departures from traditionally entrenched biases that inherently put women in the workplace at a disadvantage. Published and unpublished Minnesota court decisions reveal some progressive and some not-so-progressive aspects in their treatment of unwelcomeness.

### III. MINNESOTA – 'YA NOT QUITE SURE, 'YA ALMOST BETCHA?

Minnesota has been identified as a politically progressive

83. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 449–501 (1997) (proposing a new standard based on "the respectful person"); Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 786 (2002) (arguing for the elimination of the unwelcome conduct element in plaintiff's prima facie case, but the retention of welcomeness as evidence going to damages); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991) (arguing for the elimination of the unwelcome conduct element as "doctrinally gratuitous and personally humiliating for women"); Paul N. Monin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1191 (1995). But see Franke, *supra* note 70, at 746 (criticizing commentators who advocate eliminating the requirement of unwelcome conduct).

84. See Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 525 (1994).



state.<sup>85</sup> The state showed leadership and initiative on progressive issues such as child welfare,<sup>86</sup> healthcare for the poor,<sup>87</sup> environmental policy,<sup>88</sup> promotion of public education,<sup>89</sup> and criminal sentencing reform.<sup>90</sup> In the area of employment, the state's laws were frequently on the forefront of promoting social justice and protecting the less powerful.<sup>91</sup> In fact, the enactment of Minnesota's fair employment laws preceded Title VII.<sup>92</sup>

Because women who experience workplace sexual harassment

85. See, e.g., Walter F. Mondale, *Reflections on Fifty Years of Progress in Civil Rights, Liberties, and Participation*, 89 MINN. L. REV. 1, 3 (2004) (referring to Minnesota as "a state that has been on the cutting edge of progressive change for so many years"). See also Michael Naughton, *The Corporation as a Community of Work: Understanding the Firm within the Catholic Social Tradition*, 4 AVE MARIA L. REV. 33, 68 n.108 (2006) ("Minnesota, despite the cold, has a high quality of life in part because of the progressive character of its people in creating highly participative companies which also participate in solving the problems of the community.").

86. H.J. Cummins, *Kids Really Do Count in Minnesota*, *Report Says*, STAR TRIB. (Minneapolis), June 20, 2000, at 1A (crediting state's progressive policies as helping support poor families and improve child welfare).

87. See Allison Cendali, *Implementation of the Children's Health Insurance Program: HHS, States, and Lessons for National Health Reform*, 50 ADMIN. L. REV. 659, 673-74 (1998) (describing Minnesota health care reform, including insurance for low-income persons); Catherine T. Dunlay & Peter A. Pavarini, *1993 Managed Competition Theory as a Basis for Health Care Reform*, 27 AKRON L. REV. 141, 169-71 (1993) (same).

88. See Stephanie Adams, *Wind Power in Minnesota*, POSITIVELY MINNESOTA (Minn. Dept. of Employment and Economic Development), Dec. 2001/Jan. 2002, <http://www.deed.state.mn.us/lmi/publications/trends/0102/wind.htm> (describing development of wind energy policy).

89. Anna Lisa Garcia, *The Paper School House: The "Business" of Texas Charter Schools and Their Effect on the Minority Student Population*, 5 SCHOLAR 259, 289-90 (2003) (noting that Minnesota was on the forefront of the development of charter schools and included provisions designed to protect racial balance, to mitigate costs for low-income students, and to include children with disabilities).

90. "Minnesota was the first jurisdiction to implement legally binding sentencing guidelines developed by an independent sentencing commission." Richard S. Frase, *Sentencing Guidelines in Minnesota*, 32 CRIME & JUST. 131 (2005) (identifying Minnesota's progressivism as a factor allowing the state's guidelines to be created).

91. Minnesota is one of twenty-three states with a higher minimum wage than required by federal law. National Conference of State Legislatures, <http://www.ncsl.org/programs/employ/stateminimumwages2006.htm> (last visited Nov. 1, 2006). Minnesota provides a hospitable forum for plaintiffs in whistleblower cases. Peter Gray & Andrew E. Tanick, *Fresh Incentives to Whistle While You Work: Whistleblower Claims after the Abraham and Anderson-Johanningmeier Cases*, 59 BENCH & B. MINN. 23 (Apr. 2002). See also MINN. STAT. § 363A.01 (2004) (prohibiting employment and other types of discrimination on the basis of sexual orientation and gender identity).

92. Sheila Engelmeier & Jonathan J. Hegre, *The Deepening Divide: Minnesota and Federal Employment Laws*, 58 BENCH & B. MINN. 21, 21-22 (Apr. 2001).

in Minnesota can choose to bring their claims in either state or federal court, both jurisdictions are considered in this article. In deciding where to file claims, harassment plaintiffs and their attorneys will weigh, among other factors, the directions taken by state appellate courts and the federal circuit court, which for Minnesota is the Eighth Circuit Court of Appeals. Minnesota courts interpreting the state anti-discrimination statutes frequently reference and rely upon federal case law.<sup>93</sup>

In Minnesota, as in all other states,<sup>94</sup> a sexual harassment claimant must establish that the complained-of conduct was unwelcome.<sup>95</sup> The interpretation of unwelcome conduct under the Minnesota Human Rights Act also frequently references federal decisional law.<sup>96</sup> Minnesota state cases reiterate the federal articulation of unwelcome conduct: that “the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive.”<sup>97</sup> Both state and federal courts in Minnesota have a mixed record on promoting progressive change in handling alleged evidence of “unwelcome conduct.”

93. See *Cont'l Can Co. v. State*, 297 N.W.2d 241, 246 (Minn. 1980) (confirming that the Minnesota Human Rights Act (MHRA) is properly interpreted with reference to federal Title VII decisions). There are some differences between state and federal standards. See *Hollen v. USCO Distrib. Servs., Inc.*, No. Civ. 02-1119, 2004 WL 234408, at \*4 n.4 (D. Minn. Feb. 3, 2004) (noting that MHRA standards for vicarious liability for supervisor harassment do not incorporate standards established by recent federal decisions); cf. 17 STEPHEN F. BEFORT, MINN. PRACTICE SERIES: EMPLOYMENT LAW AND PRACTICE § 10.8(d) (2d ed. 2005) (stating that although the employer liability for supervisor harassment has not been directly decided under the MHRA, Minnesota courts will probably adopt the federal standard (incorporating the *Faragher/Elzerth* decisions)). See also *Engelmeier & Hegre*, *supra* note 92, at 22 (noting differences between federal and state law, such as that Minnesota does not explicitly differentiate between harassment by supervisors and harassment by co-workers when determining an employer's vicarious liability).

94. Jennifer Ann Dobrac, *Sex and the Workplace: “Consenting” Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 490 (2004) (stating that unwelcome conduct is an element of plaintiff's prima facie case in each state's fair employment laws).

95. MINN. STAT. § 363A.01, subdiv. 43 (2004). See also *Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997) (stating sexually harassing conduct must be unwelcome).

96. *Halvorson v. Conseco Fin. Corp.*, No. Civ. 011774, 2002 WL 31371938, at \*7 n.5 (D. Minn. Oct. 21, 2002) (assuming that state and federal standards are the same in determining whether conduct is unwelcome); *Miles v. DDF, Inc.*, No. A03-1376, 2004 WL 1049286, at \*4 (Minn. Ct. App. May 11, 2004) (referencing federal case law in analyzing MHRA claim of unwelcome conduct).

97. *Myers v. State*, No. C4-99-855, 2000 WL 2620, at \*2 (Minn. Ct. App. Jan. 4, 2000) (quoting *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 565 (8th Cir. 1992)).

A. *Establishment of Protective Formal Rules of Evidence*

The unwelcomeness inquiry provides defendants in any jurisdiction with avenues to intimidate and denigrate the harassed employee during both pre-trial and trial phases of a case. Questions posed during discovery contain barely veiled insinuations about her lack of chastity or other ways in which she “asked for” whatever harassment she received. Opportunistic defense attorneys<sup>98</sup> seek to obtain and introduce evidence of plaintiffs’ past sexual partners,<sup>99</sup> abortions,<sup>100</sup> pornography consumption,<sup>101</sup> and work as nude models.<sup>102</sup> While it may shock a harassment victim when the proceeding becomes focused on her behavior,<sup>103</sup> many defendants quickly understand the potential advantages of counterattack.<sup>104</sup>

98. “They want to show that the plaintiff is a nut or a slut.” Monin, *supra* note 83, at 1155 (quoting plaintiffs’ attorney Phillip Kay). The “nuts or sluts” defense strategy tells a story that the complaining woman is too promiscuous to sexually harass and/or too unbalanced to be believed. *Id.* See also SUSAN ESTRICH, SEX AND POWER, 179, 185 (2000) (referencing “the ‘nuts and sluts defense’”).

99. See, e.g., Eastwood v. Dep’t of Corr. of Okla., 846 F.2d 627, 631 (10th Cir. 1988) (holding that evidence of plaintiff’s sexual history is not probative of whether she welcomed sexual advances at work); Mitchell v. Hutchings, 116 F.R.D. 481 (D. Utah 1987) (prohibiting discovery of plaintiff’s past sexual partners of which the harasser was unaware).

100. See, e.g., Nichols v. Am. Nat’l Ins. Co., 154 F.3d 875 (8th Cir. 1998) (holding that the trial court erred in admitting evidence that sexual harassment plaintiff had undergone an abortion). See also Kelly-Zurian v. Wohl Shoe Co., 27 Cal. Rptr. 2d 457 (Cal. Ct. App. 1994).

101. See, e.g., Wolak v. Spucci, 217 F.3d 157 (2d Cir. 2000) (discussing effort by defendant employer to question plaintiff about her viewing of pornography); Kelly-Zurian v. Wohl Shoe Co., 27 Cal. Rptr. 2d 457 (Cal. Ct. App. 1994) (holding that trial court properly excluded evidence regarding her consumption of pornography).

102. See, e.g., Burns v. McGregor Elec. Indus., 955 F.2d 559 (8th Cir. 1992) (discussing the admission of evidence that plaintiff had, on her own time, posed nude for a national magazine); Thoreson v. Penthouse Int’l, Ltd., 59 Fair Empl. Prac. Cas. 1085 (BNA) (1990), *aff’d* 60 Fair Empl. Prac. Cas. 955 (BNA) (1992) (holding that nude model does not automatically welcome workplace sexual harassment).

103. In the author’s experience as a practicing attorney, clients in sexual harassment cases are astonished when the inquiry shifts away from the wrongful conduct of their harassers and fixes on their behavior, with obvious connotations of sin and transgression.

104. As allegedly stated by one well-known defendant:

If any woman ever breathed a word, I’ll make her pay so dearly that she’ll wish she’d never been born. I’ll rake her through the mud, bring up things in her life and make her so miserable that she’ll be destroyed. And besides, she wouldn’t be able to afford the lawyers I can, or endure it

This strategy of accentuating any signs of sexuality,<sup>105</sup> in order to depict the victim as promiscuous and immoral, replicates tactics successfully used by defendants in rape cases.<sup>106</sup> There, the purported use of such evidence was to establish the defense of consent, but the real agenda was manipulating commonly held stereotypes about women in order to malign the victim.

Because criminal “rape shield” provisions now provide a layer of protection from such abuses, parties who seek to impugn the victim of a sex crime must satisfy a higher threshold of probative value before presenting evidence about her<sup>107</sup> sexual history.<sup>108</sup> Congress enacted Federal Rule of Evidence 412 in 1978 to protect victims of rape and criminal sexual assault from degrading cross-examinations about their sexual histories and to prevent rape trials from becoming inquisitions into the morality of the victims.<sup>109</sup> As stated by the Seventh Circuit Court of Appeals:

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financially as long as I can. And nobody would believe her, it'd be her word against mine, and who are they going to believe? Me or some unstable woman making outrageous accusations. They'd see her as some psycho, someone unstable. Besides, I'd never make the mistake of picking unstable crazy girls like that.

EXTRA! UPDATE, (a Bimonthly Newsletter of FAIR), Dec. 2004, at 4 (quoting allegations of comments made by defendant Bill O'Reilly, as contained in a lawsuit filed by *O'Reilly Factor* producer Andrea Mackris in November 2004).

105. Even ordinarily innocuous behavior by a woman can be translated into sexual solicitation. See LEE MADIGAN & NANCY GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* 102–03 (1991) (“[the defense attorney] kept talking about how I wear shorts when I water my lawn—like I was a prostitute and sending out invitations.”).

106. ESTRICH, *supra* note 98, at 179. The use of past sexual history evidence to persuade a jury that a victim more than likely consented to rape or sexual assault is devastating to both prosecution and complainant. See CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 41 (1992); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 254 (1966); Marah deMeule, Note, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. REV. 145, 148–49 (2004) (citing Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764, 796–97 (1986)).

107. Although both women and men are victims of sex crimes, women are the subject of this type of violence far more frequently than men.

108. Every state now has a criminal rape shield, embodied in either a statute or rule of evidence. deMeule, *supra* note 106, at 146. State rape shields resulted from the same basic impetus as the federal shield: an intersection that arose during the 1970s between increased awareness of violence against women, feminist advocacy to improve the legal treatment of rape complainants, and a strong “law and order” political culture. *Id.* at 147–50.

109. FED. R. EVID. 412 advisory committee's note (quoting testimony of Rep. Holtzman during discussion preceding passage of H.R. 4727, which enacted Rule 412, and citing 124 CONG. REC. H11944 (1978)).

The essential insight behind the rape shield statute is that in an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she *consented* to engage in this activity with the defendant on the occasion on which she claims that she was raped. And allowing defense counsel to spread the details of a woman's sex life on the public record not only causes embarrassment to the woman but by doing so makes it less likely that victims of rape will press charges.<sup>110</sup>

In a surprisingly forward-thinking move,<sup>111</sup> Congress modified the Federal Rules of Evidence in 1994 to provide similar protections in civil cases involving sexual misconduct.<sup>112</sup> Rule 412

110. *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993) (discussing the Illinois criminal rape shield protections).

111. Congress actually rejected the Supreme Court's position that the sexual background of a harassment plaintiff is "obviously relevant." Weiner, *supra* note 74, at 636–37.

112. Federal Rule of Evidence 412 states:

- (a) Evidence generally inadmissible.  
The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
  - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
  - (2) Evidence offered to prove any alleged victim's sexual predisposition.
- (b) Exceptions.  
...
  - (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim. . . .
- (c) Procedure to determine admissibility.
  - (1) A party intending to offer evidence under subdivision (b) must –
    - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
    - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
  - (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a

was amended so that it applies to civil matters involving “alleged sexual misconduct.”<sup>113</sup> The Rule imposes a presumption that evidence offered to prove a victim’s “other sexual behavior” (such as physical conduct, fantasies, dreams) or “alleged . . . sexual predisposition” (including mode of dress, speech, life-style) is inadmissible.<sup>114</sup> Congress intended the amendment “to safeguard the alleged victim against the invasion of privacy, potential embarrassment, and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”<sup>115</sup> The Rule allows for exceptions when the proponent can establish that the probative value of the evidence significantly outweighs possible harm to the victim.<sup>116</sup>

Several federal circuits recognize the 1994 amendments as applying to sexual harassment cases.<sup>117</sup> The Eighth Circuit Court of Appeals, which has jurisdiction over any appeals of Minnesota Federal District Court decisions, has refused to issue a holding directly on the issue.<sup>118</sup> Recently, the Eighth Circuit implied that the Rule covers sexual harassment matters, but found “no danger of harm or prejudice,” despite the trial court’s refusal to hold the required *in camera* hearing following objections based on Rule

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right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

FED. R. EVID. 412.

113. The amendment was made despite opposition from the Supreme Court. Aiken, *supra* note 48, at 564 (examining the development of Rule 412).

114. FED. R. EVID. 412 (a)(1)–(2); FED. R. EVID. 412 advisory committee’s note to 1994 Amendments.

115. FED. R. EVID. 412 advisory committee’s note to 1994 Amendments.

116. FED. R. EVID. 412. *See also* FED. R. EVID. 412 advisory committee’s note to 1994 Amendments. To fit within the exception, the probative value of the evidence must “substantially outweigh[ ] the danger of harm to any victim and of unfair prejudice to any party.” FED. R. EVID. 412 (b)(2) (reversing the usual presumption of admissibility set forth in FED. R. EVID. 403, which provides that relevant evidence may be excluded if the probative value is substantially outweighed by danger of unfair prejudice, confusion, misleading jury, undue delay, waste of time, or cumulative evidence).

117. B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1104 (9th Cir. 2002) (holding that Federal Rule 412 applies to sexual harassment lawsuits); Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000) (same); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855–56 (1st Cir. 1998) (same). *See also* Howard v. Historic Tours of Am., 177 F.R.D. 48, 50 n.4 (D.D.C. 1997) (referring to advisory committee’s note as making clear that Rule 412 applies to victims of sexual harassment).

118. Warren v. Prejean, 301 F.3d 893, 906 (8th Cir. 2002); Beard v. Flying J, Inc., 266 F.3d 792, 801 (8th Cir. 2001).

412.<sup>119</sup>

Few states have similarly amended their rape shield statutes to protect civil litigants.<sup>120</sup> Where civil shields do exist, some are so narrow they apply only in special circumstances: for example, Colorado's evidence law provides privacy only to sexual assault (not harassment) plaintiffs alleging harm from persons in professional roles such as medical professionals or clergy.<sup>121</sup> The language of the few civil shields encompassing sexual harassment reflects their foundation in the context of criminal evidence rules and the influence of the federal shield. For example, California's Evidence Code shields sexual history evidence in civil actions alleging "sexual harassment, sexual assault, or sexual battery."<sup>122</sup> This language is similar to that of Hawaii's Rule 412, protecting complainants in "sexual offense and sexual harassment cases,"<sup>123</sup> Iowa's shield for those seeking damages from "sexual abuse"<sup>124</sup> and Maine's shield for those complaining of "sexual misconduct."<sup>125</sup>

After *Meritor*, women were placed in the position of having to

119. *Wilson v. City of Des Moines*, 442 F.3d 637, 643 (8th Cir. 2006) ("While we agree that the district court erred in mischaracterizing this evidence as non-Rule 412 evidence in the first instance, there was no danger of harm or prejudice to Wilson or any other party, and the district court correctly determined that it was admissible as relevant to the issues raised by Wilson's claims.").

120. Only California, Colorado, Hawaii, Iowa, and Maine have state law rape shield-type protections that expressly extend into the civil arena. See *infra* notes 121–125. See also Lewis B. Gainer, *The Missouri Human Rights Act is the Law of Choice for Sexual Harassment Victims' Privacy*, 60 J. MO. B. 20 (Jan.–Feb. 2004) (arguing that more states should provide civil shields).

121. COLO. REV. STAT. ANN. § 13-25-131 (West 2004).

122. CAL. EVID. CODE § 1106 (West 2006). California's shield prohibits all opinion evidence, reputation evidence, and evidence of specific instances of sexual conduct unless a) plaintiff alleges loss of consortium as an injury; b) the evidence concerns plaintiff's conduct with the respondent; c) plaintiff herself or her witnesses introduce such evidence, thereby opening up cross-examination; or, d) evidence is used for impeachment per other evidence rules. *Id.*

123. HAW. R. EVID. 412. Hawaii extended its shield to civil cases in 1999. Renee Furuta, *1999 Hawai'i Legislative Update*, 22 U. HAW. L. REV. 323, 330 (2000).

124. IOWA R. EVID. 5.412.

125. ME. R. EVID. 412. Maine's 2000 amendment to its Rule 412 extended it to civil cases. ME. R. EVID. 412 advisory committee's note. Maine decided not to follow the federal model, but added two provisions of its own drafting. *Id.* The amended rule prohibits reputation or opinion evidence of past sexual behavior of the plaintiff. *Id.* However, the court is given broad discretion to allow evidence of specific sexual conduct 'only' if the probative value of such evidence outweighs its potential ability to prejudice, confuse, or mislead the jury, and cause 'unwarranted harm' to the party. *Id.* The Advisory Committee notes offer a very thoughtful discussion of these rules, and the careful balancing act, which it hopes that judges will follow in admitting such evidence. *Id.*

explain why their clothing choices did not eliminate their right to work without being sexually harassed.<sup>126</sup> The enactment of Rule 412 provides a layer of protection, purporting to ensure that before evidence of manner of dress is presented, a judge must agree that “its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”<sup>127</sup> But in states without civil shields, *Meritor* still governs without formal procedural protections. A party may still use the regular motion *in limine* procedure to argue that evidence of the way a woman dressed is unfairly prejudicial and not probative of whether she welcomed particular conduct at work; however, *Meritor* is still good law and the safest route for a judge is to allow the evidence to be admitted. This reluctance to exclude such evidence, even where civil shields are in effect, can be seen in the number of times that reviewing courts have held that the failure to hold the required Rule 412(c) hearing is harmless error.<sup>128</sup>

The amendment of Rule 412 and implementation of similar state rules have not eliminated the abuse of sexual background information under cover of rebutting unwelcomeness.<sup>129</sup> But in cases where such rules are followed, the effect has been to promote a fair focus on the alleged harassment and away from past activities of the plaintiff that are likely to trade on stereotype to unfairly prejudice the factfinder.<sup>130</sup> Requiring parties who intend to offer evidence of a person’s past sexual behavior or predisposition to establish that the probative force of the information is significantly

126. “The opinion of the Court in *Meritor* asks: Did she ask for it? Did she deserve it because of her clothes and conversation? *Meritor* indulges trial judges who want to evade their duties with a stereotype.” Bernstein, *supra* note 83, at 501 (proposing a new standard based on “the respectful person”).

127. FED. R. EVID. 412 (b) (2).

128. See, e.g., *Beard v. Flying J, Inc.*, 266 F.3d 792, 801 (8th Cir. 2001) (holding that the trial court’s failure to hold Rule 412(c) hearing was harmless because plaintiff knew her employer intended to introduce evidence of her sexual conduct in the workplace).

129. See, e.g., *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091 (9th Cir. 2002) (sanctioning defendant for violation of Rule 412(c) order by introducing alleged sexual fantasies and practices). Commentators criticize civil application of Rule 412 as irreparably inconsistent because it relies upon the discretion of individual judges. Aiken, *supra* note 48, at 570–81. Aiken argues for a new civil rule that more closely tracks the rule for criminal cases. *Id.* at 580.

130. See *Socks-Brunot v. Hirschvogel Inc.*, 184 F.R.D. 113, 120–24 (S.D. Ohio 1999) (articulating that evidence of plaintiff’s prior sexual relationship, conversations about oral sex, alleged flirtatious behavior, and use of profanity should not have been admitted pursuant to Rule 412 and granting plaintiff’s motion for new trial).



greater than the danger of harm and unfair prejudice, via an *in camera* hearing, provides a check on the cultural biases that otherwise maintain social and economic inequality.

Minnesota has never considered amending its rape shield<sup>131</sup> to encompass civil harassment plaintiffs.<sup>132</sup> The state's failure to create any formal protective mechanism to shield sexual harassment plaintiffs shows a lack of progressive initiative. Application of the evidentiary rule limiting the admissibility of sexually related conduct of a civil harassment victim is an example of government regulation intended to equalize social and legal imbalances. The mechanism of formal rules protects sexual harassment victims from lingering social biases and stereotypes that prevent the substance of their claims from being heard.<sup>133</sup> The lack of formal protections for sexual harassment plaintiffs who wish to complain about how they were treated at work allows them to be intimidated out of pursuing valid claims, perpetuating the social and economic inequality of women. The absence of such evidentiary protections, when other jurisdictions have enacted them, also implicitly allows and condones the reinforcement of traditional biases against sexually autonomous women. Minnesota has not handled the unwelcomeness inquiry as progressively as the federal judicial system or the several states that have added rape shield-type protections for victims in civil sexual misconduct suits.<sup>134</sup>

*B. Reframing and Reforming Stereotypes About Women, Sex, and Desire*

The notion that women who have engaged in some sexual conduct in the past may reasonably be perceived to have invited all other sexual conduct is present in several other variations that are often relied upon and reinforced as the unwelcome conduct

131. Minnesota has had a criminal rape shield law since 1975. *See* MINN. STAT. § 609.347 (2004).

132. Conversation with Peter Thompson, Professor of Law, Hamline University School of Law, Chair of the Minnesota Supreme Court Advisory Committee on Rules of Evidence, in St. Paul, MN (June 7, 2006). Mr. Thompson also noted that Minnesota's Rules of Evidence are not modeled after the Federal Rules of Evidence.

133. The rule's reliance on judicial discretion and the risk that judges will be seduced by stereotype are problematic. *See* Aiken, *supra* note 48, at 570–81. Still, a procedural rule that plaintiffs can assert is preferable to the absence of any such rule, which could be deemed to signify that state's intentional unwillingness to limit such evidence.

134. *See, e.g.,* CAL. EVID. CODE § 1106 (West 1995); COLO. REV. STAT. ANN. § 13-25-131 (West 2004).

requirement plays out in litigation. As sexual harassment disputes are argued through the court system, some themes underlying the interpretation of the victim's conduct as "welcoming" emerge.

The structure of the inquiry itself reinforces the notion that women who engage in paid employment in the workforce may be assumed to potentially invite sexual overtures unless they overtly indicate otherwise. Abandoning the "separate sphere" of the home is used as a proxy for past sexual conduct. Included within this notion is the unstated, but overarching, presumption that all women are open to potential sexual conduct with men. Thus, women who fail to adhere to the norms for expected feminine behavior are viewed as having "asked for" the harassment they received. This interpretation creates a penalty for non-conforming behavior, rendering some sexual behavior an invitation for unlimited, even abusive, sexual conduct. The same assumptions transform sexual behavior with certain persons to an invitation extended to all other persons. Likewise, women who do not make formal complaints about the harassment and women who treat the harasser in friendly ways are penalized for violating behavioral expectations. A sideline theme in several Minnesota decisions is the notion that some claims of unwelcome harassment are actually mere manifestations of regret or ambivalence about sexual encounters.<sup>135</sup>

The presence of each of these anti-progressive assumptions in sexual harassment case law is explored below, followed by an examination of the extent to which Minnesota plaintiffs can anticipate that their courts will disavow traditional stereotypes that perpetuate the social inequality of women.

*1. Good Girls Don't – Stereotypes and Assumptions Based on the Impropriety of Certain Conduct by Women*

Progressive treatment of unwelcomeness would reject theories

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135. See *infra* notes 204–08 and accompanying text. The other pattern noted in the Minnesota decisions analyzing unwelcomeness is the frequency of unpublished opinions. See, e.g., cases cited *infra* notes 142, 152, 174, 178, 182, 188–89, 191–92. This may reflect a feeling on the part of the courts that each decision should be made based very closely on the specific facts at hand, such that allowing them to become published precedent creates a false impression as to the boundaries of the law. On the other hand, the lack of clear precedent leaves plaintiffs vulnerable to fear and intimidation, since there are no reliable boundaries for admissible or inadmissible evidence with regard to the issue of unwelcomeness.

based on outdated stereotypes and assumptions about the way women should or should not behave. Traditional norms for female behavior prohibited sexual expression and required women to hide their sexuality. Respectable women did not engage in sexually open or expressive ways, and if they did, such women were deemed to have invited an entire universe of sexual overtures from others. In other words, because the woman violated standardized behavioral norms restricting female sexuality, she provoked the harassing conduct and lost the right to complain when it occurred. When the unwelcomeness inquiry critiques the female employee's behavior for signs that she invited the harassment, any deviation from the traditional role of a "good girl" can be argued as evidence that the conduct was welcome. Perpetuation of these norms forces women to choose between relinquishing their individual rights with regard to sexuality or facing being categorized as too promiscuous to merit protection from harassment.

Progressive doctrine would not require women to cover their sexuality to avoid inviting sexual advances at work. Women who do not abide by the unwritten rules about dress, language, and discretion are deprived of a fair process, if not a remedy, since the law expressly considers whether they brought the harassment upon themselves. A progressive take on the unwelcomeness determination would discard this double standard as entrenching a tradition of inequality.

*a. Working Women Are Sexually Available, Unless They Unequivocally Indicate Otherwise*

The unwelcomeness doctrine has been justified as necessary because women may be interested in sexual and/or romantic overtures at any time, including on the job.<sup>136</sup> Instead of requiring that the alleged harasser establish why he had reason to believe his overtures would be welcomed, the law incorporates an assumption that any and all women may welcome sexual attention from men at work.<sup>137</sup> The recipient of the harassment is required to disprove

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136. See Chambers, *supra* note 83, at 747 (stating the "possibility" that "some sex-based workplace conduct may not cause harm has led some courts to assume such conduct is welcome until proven otherwise").

137. Louise F. Fitzgerald, *Who Says?; Legal and Psychological Constructions of Women's Resistance to Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 97 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (stating that "[b]urdening the plaintiff with proving that the man's behavior was unwelcome

this assumption by establishing that her behavior indicated otherwise.<sup>138</sup>

This aspect of unwelcomeness perpetuates a long history of sexually objectifying women, especially those who venture beyond their prescribed sphere. For example, women have been denied employment opportunities on the basis that their mere presence in the workplace would encourage sexual assaults.<sup>139</sup> Despite their now common participation in the paid workforce, working women continue to be sexualized and their rights evaluated in light of their status as sexual objects holding interest to men.

The stereotype that a woman who works outside the home thereby indicates sexual availability is steeped in traditional gender roles that disenfranchise women. The underlying assumption is a carryover from the time when women who participated in the economic marketplace were viewed as likely to be prostitutes. Separate-spheres ideology, ordaining stereotypical female roles and behaviors as the natural destiny of women, underlies the law's treatment of women who violate behavioral norms as inviting harassment.<sup>140</sup> This theory accepted legal regulation of conduct in the public sphere of government and business, while viewing domestic and family disputes as existing in the private sphere, and therefore not properly subject to the purview of law.<sup>141</sup> Women who work have ventured out of their proper sphere.

A variety of this theme underlies the basis for some Minnesota court decisions. In one case, a woman who conversed about

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assumes that any woman is sexually available to any man, known or unknown—unless and until she can convince him (and the court) otherwise”).

138. Welcomeness is presumed, absent sufficient contrary evidence. *See, e.g.*, *Docktor v. Rudolf Wolff Futures, Inc.*, 684 F. Supp. 532, 533, 535 (N.D. Ill. 1988) (holding overtures by boss were “not . . . clearly unwelcome,” even though female employee rejected them), *aff'd*, 913 F.2d 456 (7th Cir. 1990).

139. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977) (holding that women could be excluded from working as prison guards in male penitentiaries).

140. *See* Taub & Schneider, *supra* note 51, at 163 (“Since [the] ‘paramount destiny and mission’ of women is mandated by ‘nature,’ ‘divine ordinance,’ and ‘the law of the Creator,’ the civil law need not recognize the claims of women who deviate from their proper role.”) (critiquing Justice Joseph Bradley’s concurrence in *Bradwell v. Illinois*, 83 U.S. 130 (1873)).

141. Taub & Schneider, *supra* note 51, at 154–56 (describing traditional lack of legal recognition or enforcement of rights in the “private sphere,” in which women were once relegated to inhabiting). *See also* BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD, TWO CENTURIES OF THE EXPERTS’ ADVICE TO WOMEN* 12–13 (2005) (connecting the creation of two opposing, separate spheres to the rise of the Market economy during the nineteenth century industrialization and capitalization).

drinking and hot tubs during a business dinner was criticized because “she did not do or say ‘anything overtly to tell [the harasser] that she was unwilling to participate in sex with him.’”<sup>142</sup> The court’s comment implies that when a woman has a meal with business associates and drinking and hot tubs are discussed, she needs to indicate that she does not intend to have sex with any of her dinner partners. In another case, the lower court held sexual conduct was not unwelcome because “sexual tension” or “requests for a romantic relationship” are not sexual harassment.<sup>143</sup> By their very presence in the workplace, these women were expected to encounter some level of sexuality or sexual advances, and it was up to them to prove that they did not want them.

This incorporation of the assumption that women at work may be assumed to welcome sexualized conduct from men is especially unfair to women who come to work without any interest in sexualized conduct, particularly from men. Because the unwelcomeness doctrine assumes that all women are straight,<sup>144</sup> it frequently overlooks the possibility that some women are lesbians, or are otherwise not interested in sexual conduct from colleagues. A progressive interpretation of unwelcomeness would not assume all women are straight, which marginalizes sexual minorities and essentializes women.

Progressive treatment of the unwelcome conduct inquiry would facilitate a workplace without harassment on the basis of sex, understanding the individual and societal benefit that such regulation has. Progressive doctrine would unapologetically seek this goal as an example of where government can do good. Progressive treatment of unwelcomeness would refuse to condone traditional notions about women who earn money by working outside the home. Such analysis would depart from the assumption that all women are sexually available at work, absent outward indications either way.

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142. *Halvorson v. Consecro Fin. Corp.*, No. Civ. 011774RHKAJB, 2002 WL 31371938, at \*8 (D. Minn. Oct. 21, 2002).

143. *Petersen v. Minneapolis Cmty. Dev. Agency*, No. C7-94-510, 1994 WL 455699, at \*2 (Minn. Ct. App. Aug. 23, 1994) (reversing the trial court’s grant of summary judgment on three out of four causes of action).

144. See Mary Coombs, *Title VII and Homosexual Harassment After Oncale: Was It a Victory?*, 6 DUKE J. GENDER L. & POL’Y 113, 147 (1999) (noting that under the unwelcomeness framework, women are “presumed to be heterosexual and therefore to find at least some sexual talk by some men welcome”).

*b. All or Nothing – Expressing Some Sexual Openness or Participating in Vulgarly*

The unwelcomeness requirement connotes that women who engage in some sexual behavior are therefore amenable to any other sexualized conduct, absent affirmative proof to the contrary.<sup>145</sup> Suggestive banter and innuendo can be argued to welcome escalated conduct, such as obscene gestures, physical touching, and outright abuse.<sup>146</sup> Participation in sexual jokes and comments can be found to welcome groping, shoving, and threats of violence.<sup>147</sup> This aspect of the unwelcome conduct inquiry enables plaintiffs to be humiliated and intimidated during pre-trial discovery and motions, regardless of whether the evidence is later ruled to be inadmissible.<sup>148</sup> Even conduct that the harasser did not perceive firsthand and activities that the woman engaged in away

145. See Chambers, *supra* note 83, at 747 (critiquing the unwelcomeness element as “suggest[ing] that a particular employee’s willingness to engage in sex-based conduct in the workplace justifies assuming that any employee may be open to an office romance until that employee makes clear that she is not”).

146. Weiner, *supra* note 74, at 627–28 (“If she acted in a ‘sexually aggressive’ way or used ‘sexually-oriented language,’ this is viewed as a justification for abuse.”). See also Ripley v. Ohio Bureau of Employment Servs., No. 04AP-313, 2004 WL 2361571, at \*1–2, \*4 (Ohio Ct. App. Oct. 21, 2004) (agreeing that where a woman had engaged in sexual joking, remarked about her breasts, collected suggestive cartoons and jokes, did not hide her sexual activities, compared breast sizes with a female co-worker, and one day did not wear a bra to work, such evidence negated her claim that she did not welcome direct sexual advances from co-workers, including lip-licking, daily demands for sex, lifting her skirt, and blatantly sexual gestures).

147. See, e.g., Reed v. Shepard, 939 F.2d 484, 486, 491–92 (7th Cir. 1991) (noting that plaintiff who had suffered from being punched in the kidneys, tickled, handcuffed to various objects in the office, forced to put her head in the laps of male co-workers, mocked with an electric cattle prod, dunked into a toilet, and maced could not prevail on sexual harassment claim because she participated in similar activities since she had told dirty jokes, made sexual comments, showed off her abdominal scars, went braless, and gave suggestive gifts to her colleagues); Mangrum v. Republic Indus., 260 F. Supp. 2d 1229, 1252–53 (N.D. Ga. 2003) (stating that plaintiff who engaged in vulgar language, gave massages, and exchanged back scratches with co-workers is deemed to have welcomed supervisor’s repeated requests for sex and patting her behind), *aff’d*, 88 F. App’x 390 (11th Cir. 2003); Weinsheimer v. Rockwell Int’l Corp., 754 F. Supp. 1559, 1563–64 (M.D. Fla. 1990) (holding that because she engaged in sexual banter, plaintiff was deemed to have welcomed the actions of a co-worker who placed his penis in her hand), *aff’d*, 949 F.2d 1162 (11th Cir. 1991).

148. See Katie M. Patton, Note, *Unfolding Discovery Issues That Plague Sexual Harassment Suits*, 57 HASTINGS L.J. 991, 997–98 (2006) (noting effects of discovery abuses, including those hinging on disproving unwelcome conduct, in sexual harassment litigation).

from work can be examined in discovery and proffered by defendants as arguably constituting solicitation of sexual conduct in the workplace.<sup>149</sup> The most regressive trend is where some participation in sexual or vulgar activities precludes an employee from establishing that other, even escalated, types of sexual conduct were unwelcome as a matter of law, depriving the employee of the opportunity to present her case to a factfinder.

A progressive evaluation of whether conduct was unwelcome would not interpret some acceptance or expression of sexuality by female employees as inviting disproportionate sexual overtures or outright abuse in the workplace.<sup>150</sup> Also, progressive treatment of the law would examine the possibility that the conduct in question was engaged in or acquiesced to without inviting or soliciting the conduct. Developments in decisional law should recognize that some women may be drawn to engage in responsive behavior merely as a way of defending themselves with retorts, as a way of fitting in, or out of fear of the consequences of refusing to accede to advances.<sup>151</sup>

The all-or-nothing premise lingers on in Minnesota trial courts, but the appellate court appears unconvinced by it. In one

149. See *Horney v. Westfield Gage Co.*, 77 F. App'x 24, 28–30 (1st Cir. 2003) (defendants argued on appeal that trial court improperly excluded evidence that plaintiff bared her breasts while working at a previous job, which defendants contended could establish that sexual comments made by supervisor at subsequent job were not unwelcome); *Burns v. McGregor Elec. Indus.*, 955 F.2d 559, 565 (8th Cir. 1992) (stating that because evidence of sexually provocative speech or dress is relevant in determining whether conduct was unwelcome, the fact that plaintiff posed for nude photos outside of the workplace was relevant; plaintiff's later victory against this holding was marred by the Eighth Circuit's opinion, which agreed that posing nude outside of the workplace was relevant to a consideration of the totality of circumstances), *rev'd*, 989 F.2d 959 (8th Cir. 1993).

150. *Howard v. Historic Tours of Am.*, 177 F.R.D. 48 (D.D.C. 1997) (noting "a striking disproportion" between the conduct female employees allegedly consented to with other employees and the conduct allegedly committed by the defendant harassers).

151. See, e.g., James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 545 (1995) (stating that women try to defuse workplace sexual harassment by joking about it). Many harassed employees respond in indirect, non-confrontational ways, such as by "ignoring the harasser (44%), avoiding the harasser (28%), making a joke of the behavior (15%), or going along with the behavior (7%)." Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC'Y REV. 83, 86 n.1 (2005) (quoting U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995), <http://www.mspb.gov/studies/sexhar.pdf>).

case, conduct had been determined to be not unwelcome as a matter of law, based on evidence that the employee had “frequently used profanities and engaged in vulgar behavior.”<sup>152</sup> Her behavior was found to have welcomed the following behavior from her co-workers as a matter of law: explicit references to sexual activities, forcing her head to a male co-worker’s crotch area, showing pornographic photos, intruding on her in the bathroom, grabbing her thigh, telling her that women belonged at home, giving her orders without authority, and threatening her for complaining.<sup>153</sup> Reversing, the appellate court found that the harassment was unwelcome, and noted that women who use “foul language or sexual innuendo in a consensual setting” do not waive their right to a workplace free of harassment.<sup>154</sup>

Decisions in Minnesota Federal District Court adhere to the principle that unwelcomeness should be determined by the trier of fact, regardless of the plaintiff’s participation in name-calling or suggestive comments. In one case, the employer argued that two women who participated in name-calling in the workplace had welcomed the sexually vulgar conduct of their co-workers.<sup>155</sup> The court denied the employer’s motion for summary judgment and held that whether the conduct was unwelcome was an issue of disputed fact for trial.<sup>156</sup> A more progressive opinion would have indicated that even if defendants can establish that the plaintiffs engaged in mutual name-calling, it provides scant basis for arguing that the plaintiffs welcomed crude sexual drawings, sexual gestures, exposure of the genitals, touching of their bodies (including breasts), or lewd sexual propositions.

Similarly, an employer-defendant in another case argued that

152. *Myers v. State*, No. C4-99-855, 2000 WL 2620, at \*2 (Minn. Ct. App. Jan. 4, 2000) (quoting uncited underlying district court decision).

153. *Id.* at \*3.

154. *Id.* at \*2 (quoting *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 963 (8th Cir. 1993)).

155. *Castellanos v. Wood Design, Inc.*, No. Civ. 03-3416 DWF/JSM, 2005 WL 41628, at \*2 (D. Minn. Jan. 4, 2005). The conduct consisted of the following: 1) giving the women a drawing of a donkey with human genitals and sexually vulgar words inscribed on it; 2) grabbing and exposing themselves; 3) touching or attempting to touch the women’s breasts, shoulder, and bellybutton; 4) telling the women they should have their underwear removed “and to itch [their] pussies;” and 5) calling them names (“bitches,” “cunt,” and “whores”), remarking “touch your ass,” “son of a dick,” and “mother fuckers,” and saying they wanted to “scratch” the women’s “pussies.” *Id.* at \*1.

156. *Id.* at \*4.



because the employee had participated in numerous off-color conversations at work, she thereby welcomed the sexual overtures and vulgar conduct of her supervisors.<sup>157</sup> The court rejected the employer's contention that because she had engaged in vulgar language in some situations, the conduct of her supervisors could not have been unwelcome to her.<sup>158</sup> Her behavior in other contexts was found to be relevant to the factual determination as to unwelcome conduct, but not sufficient to grant summary judgment.<sup>159</sup>

But the Eighth Circuit's commitment to this principle appears somewhat compromised and arguably dependent upon the gender of the plaintiff. A three-judge panel held that a female employee's use of offensive language precluded her from establishing that her supervisor's use of the same or similar words was unwelcome as a matter of law.<sup>160</sup> Judge Lay dissented, stating that the employee's occasional use of swearing in her general communication could not constitute welcoming, as a matter of law, the constant repeated use of the same or similar words in a significantly different manner, one that was directed towards demeaning women.<sup>161</sup> Judge Lay emphasized that the use of "foul language" in the workplace might weigh against a factual finding that sexual harassment was unwelcome, but should not bar a claim entirely as a matter of law.<sup>162</sup> "I am unaware of any case that precludes a plaintiff from arguing

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157. *Dull v. St. Luke's Hosp. of Duluth*, 21 F. Supp. 2d 1022, 1024 (D. Minn. 1998). Supervisor misconduct included referencing a picture of a penis, asking whether she had PMS, disseminating an off-color joke about gynecologists, disseminating a joke about blondes, gesturing toward her breasts and the supervisor's crotch while telling a sexual joke, eying her cleavage and asking whether she was trying to arouse him, and telling her that she had nice breasts. *Id.* at 1024.

158. *Id.* at 1026.

159. *Id.* ("While her conduct in other contexts may otherwise be relevant, it does not demonstrate as a matter of law that she was inviting all types of sexually explicit statements and conduct." (citing *Burns*, 989 F.2d at 963-64)).

160. *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721 (8th Cir. 2000). The decision involved a very thin consensus. *Id.* Judge Beam held that Ms. Hocevar was unable to show that her supervisor's constant references to women as "bitches," "fucking bitches," and "fat fucking bitches" were unwelcome because she had also used the words "bitch" and "fuck" in the workplace. *Id.* at 724, 736-37. Judge Gibson concurred in the result, writing separately to state, among other things, that because Ms. Hocevar admitted using the words, she could not establish that her supervisor's use of the same words was subjectively offensive to her. *Id.* at 740-41.

161. *Id.* at 729-30 (Lay, J., dissenting).

162. *Id.* at 730.

that the employer's constant use of sexually charged language and off-color jokes is unwelcome merely because the plaintiff at times engaged in swearing."<sup>163</sup>

Judge Lay opined that the circumstances described by the employee, including her complaint to management and her need for psychological care, were sufficient to establish at trial that the harassment was unwelcome and subjectively offensive to her.<sup>164</sup> She was not permitted that opportunity because her claim was denied on summary judgment.

Just two years later, the Eighth Circuit rejected an employer's argument that a *male* employee's use of sexually explicit language at work precluded a finding that vulgarities directed at him were unwelcome.<sup>165</sup> Evidence presented at trial that the employee repeatedly complained to management, documented and then tried to erase sexual statements about himself, and sustained psychological difficulties was found sufficient to support a finding that the graffiti was unwelcome.<sup>166</sup> Apparently without irony, that panel cited to Judge Lay's dissent in *Hocevar* for the proposition that complaining to management and experiencing fear and depression constitute evidence that conduct was unwelcome.<sup>167</sup>

*c. All About Eve – One's as Good as the Next*

A similar premise that is reinforced by traditional interpretations of the unwelcomeness inquiry is that a woman's sexual conduct with one person tends to show that she welcomed sexual conduct with other persons.<sup>168</sup> This theory relies upon

163. *Id.* Judge Lay also criticized the majority for ignoring the supervisor's communication of violent threats, vulgar jokes, a sexually explicit audiotape, and apparent approval of similar behavior from others at meetings. *Id.*

164. *Id.*

165. *Beach v. Yellow Freight Sys.*, 312 F.3d 391, 396–97 (8th Cir. 2002). The complained-of conduct that was allegedly "invited or solicited" by the employee's explicit language consisted of graffiti written throughout the workplace that identified him by name, asserted that he was gay, and obscenely accused him of engaging in specific sexual activities, including incest and bestiality. *Id.* at 394–96.

166. *Id.* at 396–97. The court agreed that he "neither solicited nor invited it and regarded the conduct as undesirable or offensive." *Id.* at 396 (quoting *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 966 (8th Cir. 1999)).

167. *Beach*, 312 F.3d at 396–67 (citing *Hocevar*, 223 F.3d at 730).

168. *See, e.g., Beard v. Flying J, Inc.*, 266 F.3d 792, 797–98 (8th Cir. 2001) (discussing the employer's contention that supervisor's conduct, touching the plaintiff's breasts with his body, cooking tongs, and a pen was welcomed because plaintiff was alleged to have suggestively touched a male co-worker's thigh and to have frequently used suggestive language at work).

traditional requirements of female chastity and the notion of the fallen woman.<sup>169</sup>

Decisions in many jurisdictions treat this theory as valid, emboldening defendants and neutralizing plaintiffs' efforts to preclude the admission of such evidence. A woman who discusses her sex life with one co-worker may be argued to have lost the right to complain about sexual inquiries from another co-worker.<sup>170</sup> A woman who openly engages in a sexual relationship with one co-worker may be asserted to have welcomed a potential sexual relationship with any other co-worker.<sup>171</sup> A woman who collects sexual jokes and makes comments about her breasts in a discussion with a female co-worker may be alleged to have welcomed a male co-worker's propositions and vulgar remarks.<sup>172</sup>

By facilitating these types of arguments as potential defenses to sexual harassment claims, the unwelcomeness requirement supports the assumption that female sexuality is somehow fungible, and that a woman's decision to engage in sexual conduct with a man means she will do the same with any other man.<sup>173</sup> Minnesota courts have acquiesced to this faulty logic on at least one occasion.<sup>174</sup>

Progressive law, seeking to reform sexist double standards,

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169. See Rachael Knight, *From Hester Prynne to Crystal Chambers: Unwed Mothers, Authentic Role Models, and Coerced Speech*, 25 BERKELEY J. EMP. & LAB. L. 481, 488–89, 499–520 (2004) (discussing courts' unfavorable treatment of discrimination claims made by women who refused to "cover" (i.e., hide, minimize, or neutralize) the fact that they were unmarried and pregnant).

170. See, e.g., *King v. Town of Hanover*, 959 F. Supp. 62, 66 (D.N.H. 1996) (explaining that innuendo used by a plaintiff with co-workers was potentially relevant to determining whether sexual overtures from a supervisor were welcome), *aff'd*, 116 F.3d 965 (1st Cir. 1997).

171. See, e.g., *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1105 (9th Cir. 2002) (noting that defendants offered evidence of plaintiff's sexual comments and behavior away from work with other co-workers to establish welcomeness of harassment from a co-worker).

172. *Ripley v. Ohio Bureau of Employment Servs.*, No. 04AP-313, 2004 WL 2361571, at \*1 (Ohio Ct. App. Oct. 21, 2004) (mentioning the effect of plaintiff's use of sexual jokes on unwelcomeness).

173. See *Chambers*, *supra* note 83, at 747 n.69 (citing *Benedet*, *supra* note 74, at 140) (arguing that investigation of women's sexual history in harassment matters is founded on the idea that "[s]exual acts are . . . essentially fungible for women, both as to the partner with whom they engage in them and as to the location in which they take place").

174. *Gatzke v. Campbell*, No. C9-97-507, 1997 WL 757383, at \*3 (Minn. Ct. App. Dec. 9, 1997) (where defendant argued that because plaintiff had engaged in off-color humor with bar staff, sexual overtures from her supervisor were not unwelcome).

would not assume that a woman's sexual expression or conduct with one person or co-worker invites sexual overtures from any or all others. Some courts in other jurisdictions have overtly rejected this theory at the discovery stage, denying the employer motion to compel the harassed employee to reveal all sexual relationships she may have had with co-workers.<sup>175</sup> In doing so, the District Court of the District of Columbia articulated that the interpretation of welcoming conduct should not be tethered to traditions that hobble women, explicitly rejecting the underlying premise of defendants' argument that if a woman was known to have engaged in a sexual relationship with one co-worker, it would be reasonable to assume that she welcomed other sexual advances at work:

[T]hat perception would be reasonable only if it fairly could be said that a man who learns of a woman's affair is justified in believing that she will be as willing to have a sexual relationship with him as she was to have one with her lover. While such a perception might have been justified, in men's minds, in Victorian England and Wharton's "Age of Innocence" in America, when men discriminated between the women they married and the women they slept with, it has nothing to do with America in 1997. While religious and other leaders condemn it, sexual behavior, outside of married life, between consenting adults is so common and so commonly accepted by the society, that it is absurd to think that any man in 1997 can be justified in believing that a woman who engages in it is so degraded morally that she will welcome his sexual advances without protest. Since a man cannot seriously contend in 1997 that any woman who has a sexual relationship with her co-worker is morally degraded, justifying his conclusion that she will not resist him, he is reduced to arguing that because a woman took one co-worker as a lover he is justified in his belief that she will accept him and welcome his sexual advances. That, in all but his imagination, is *non sequitur*.<sup>176</sup>

The scathing rebuttal continues throughout this opinion, with the court sending a very clear signal that it will not tolerate this construction of welcoming conduct.<sup>177</sup>

175. *E.g.*, Howard v. Historic Tours of Am., 177 F.R.D. 48, 53 (D.D.C. 1997).

176. *Id.* at 52.

177. The expected effect of this opinion would be that parties in sexual harassment disputes before this court had, from the date of this opinion, a definite idea as to how potential claims of (un)welcome conduct would be viewed by this

A similar but more succinct conclusion was reached in a Minnesota case where the court of appeals found that the employee's "conversations with her female co-workers did not open the door to sexual comments directed at her by her male boss."<sup>178</sup> The employer's owner and president had hugged and kissed his employee in a back hallway; left a sexually explicit statue and a magazine article depicting animal sexual positions on her desk; described his son's genitalia to her; implied that if she had an affair with him, she could get a company car; and told her that he loved her.<sup>179</sup> The employer argued unsuccessfully on appeal that the conduct in question was not unwelcome, in part because the employee had engaged in conversations of a sexual nature with female co-workers.<sup>180</sup> To its credit, the Eighth Circuit appears to have drawn the line at admitting into evidence only sexualized behavior that occurred in the workplace.<sup>181</sup>

*d. Weighing Conflicts in the Evidence as Establishing Welcomeness Per Se*

Courts have determined disputed facts regarding welcomeness, revealing a disposition toward recognizing a theory of welcomeness per se: if she engaged in the conduct, she must have welcomed it.<sup>182</sup> These missteps by trial courts have often been corrected on appeal.<sup>183</sup>

The requirement that a plaintiff establish unwelcomeness,

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particular judge.

178. Hansen v. Regency Corp., No. C6-95-962, 1996 WL 33116, at \*2 (Minn. Ct. App. Jan. 30, 1996).

179. *Id.* at \*1.

180. *Id.* at \*2.

181. See Beard v. Flying J, Inc., 266 F.3d 792, 801-02 (8th Cir. 2001) (permitting evidence of sexual behavior that occurred in the workplace); Excel Corp. v. Bosley, 165 F.3d 635, 640-41 (8th Cir. 1999) (affirming refusal to allow evidence of sexual conduct that occurred away from work).

182. See Miles v. DDF, Inc., No. A03-1376, 2004 WL 1049286, at \*4 (Minn. Ct. App. May 11, 2004) (quoting trial court's findings of fact on summary judgment, which ignored the employee's statement that she was threatened with the loss of her job if she refused to engage in a sexual relationship with her boss and found that her involvement in the planning of their sexual encounters negated her testimony so "as to leave no doubt as to the factual truth" that she welcomed the behavior). To its credit, the appellate court reversed because the trial court had made improper credibility determinations. *Id.* at \*5-6.

183. *Id.* at \*5 (noting that the power disparity between the employee and her boss may explain her acquiescence to conduct she claims was unwelcome; reversing and remanding sexual harassment claim for trial).

instead of requiring harassers to prove affirmatively that their conduct was invited, has been stretched to support the argument that any evidence that conflicts with the notion of unwelcomeness requires a determination that the conduct was not unwelcome. Thus, evidence that the plaintiff was friendly or that she eventually submitted to the advances has been used as a basis for concluding the plaintiff cannot establish unwelcomeness as a matter of law.<sup>184</sup> Such holdings represent a significant departure from the principle that the existence of unwelcome conduct must be determined by the finder of fact, based on the totality of the circumstances.

To its credit, the Minnesota Court of Appeals has mostly resisted attempts to move the law in this direction, holding that trial courts that use conflicting evidence to find against the harassed employee have made improper credibility and factual determinations concerning the issue of unwelcomeness.<sup>185</sup> In one case, the trial court had viewed evidence of the employee's submission to a sexual relationship with her boss as so overwhelmingly predominating in favor of the employer that unwelcome conduct could not be established.<sup>186</sup> Disagreeing, the appellate court noted "considerable deposition testimony" that her boss's initial overtures were not welcome: she had resisted his first kiss, her boss said she would be fired if anyone found out about their relationship, she objected to his touching and kissing, she told him "no" and pushed him away before they had sex, and at first she hated their sexual contacts, but put up with them just to keep her job.<sup>187</sup> Allowing such conflicts in the evidence to be resolved by the finder of fact is pivotal to the construction of unwelcomeness as hinging upon context and determinations of credibility.<sup>188</sup>

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184. See, e.g., *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990) (noting district court's ruling that plaintiff's submission to sexual requests precluded a finding of unwelcome conduct as a matter of law).

185. See *Miles*, 2004 WL 1049286, at \*5 (reversing summary judgment for the employer).

186. *Id.* at \*4. The evidence included the employee's acquisition of a hotel room for the two of them, providing for drinks in the room, taking off her clothes before her boss arrived, discussing their sexual relationship with friends and coworkers, purchasing and exchanging gifts, arranging for their children to meet, and discussing marriage and the possibility of operating the company together. *Id.* at \*1-2.

187. *Id.* at \*4.

188. See also *Petrovic v. Ridgeview Country Club*, No. C6-01-1474, 2002 WL 765490, at \*3 (Minn. Ct. App. Apr. 24, 2002) (reversing judgment that conduct

Conversely, the appellate court has rejected efforts by defendants to appeal findings of unwelcome conduct, following a trial, based on allegedly conflicting friendly or receptive behavior on the part of the plaintiff. In one instance, the court upheld a determination that conduct was unwelcome despite the existence of some indications of welcomeness.<sup>189</sup> Evidence presented at trial that the employee had made meals for the employer, discussed her personal life, and sent him love letters after she quit “may conflict with but does not rebut the prima facie case.”<sup>190</sup> Similarly, the court of appeals upheld a finding that conduct was unwelcome over defendant’s claim that inconsistencies and the cards she sent to him and signed “love” proved otherwise.<sup>191</sup>

In a recent departure from this stance, however, the appellate court upheld a finding that an employee’s allegedly conflicting response to harassing conduct precluded her from establishing unwelcomeness as a matter of law.<sup>192</sup> The employee argued that a factfinder should resolve the issue, asserting that her rejection of the harasser’s invitation for a Las Vegas trip, her complaints concerning that proposal and a suggestive note he sent, her refusal to share meals with him, and “her demeanor and disposition” would establish that the conduct was unwelcome.<sup>193</sup> The appellate court refused to allow her to present this evidence, citing her offer of a two-block ride after a party, acceptance of candy bars, e-mail stating that she “could never be ‘mad’ at” him, and a note

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was not unwelcome as a matter of law because the employee had continued to work at parties where claimed harassment occurred, and holding that trial court had engaged in improper determination of disputed fact of unwelcomeness).

189. *Schurstein v. Selmer Law Firm, P.A.*, No. C9-99-530, 1999 WL 732438, at \*1-2 (Minn. Ct. App. Sept. 21, 1999) (holding that it was not clearly erroneous for the trial court to find that the employer had sexually harassed his employee by making advances, threatening termination when she tried to avoid his phone calls, going to her apartment the day after terminating her and initiating sex, and rehiring her after that, conditional on her writing a thank you note for her job).

190. *Id.* at \*2.

191. *B.L.L. v. Estate of Heller*, No. C0-98-1359, 1998 WL 901757, at \*2 (Minn. Ct. App. Dec. 29, 1998) (noting that her trial testimony indicated that she told the employer his overtures “were ‘not right,’” tried to avoid his physical advances, and changed the subject when he made sexual comments).

192. *Monson v. N. Habilitative Servs.*, No. A05-1102, 2006 WL 771919, at \*1, \*6 (Minn. Ct. App. Mar. 28, 2006) (upholding summary judgment for the employer).

193. *Id.* at \*6. In addition, she had refused his offer of help getting on her coat until the two “were engaged in a ‘tug of war,’” resisted his attempt to hold her physically and help her cross an icy walkway, and told him she was not interested in going to Las Vegas with him. *Id.* at \*1.

including a smiley face to politely decline his offer of food.<sup>194</sup> Based on these facts, the appellate court held that her claim of unwelcome conduct was “not substantiated by any outward manifestations of such an attitude.”<sup>195</sup>

If followed, this newer interpretation of the unwelcomeness element as impossible to establish where there is some indication that the conduct was welcome retreats from the goal of enabling plaintiffs to establish unwelcome conduct by presenting the facts contextually. Particularly where such alleged conflicts are merely friendly, as opposed to sexually tinged, behavior, this standard facilitates continued inequality by converting courtesy and social graces into an invitation for sexual advances.<sup>196</sup>

Women who adhere to their gender roles by being nice, loyal, and nurturing<sup>197</sup> can be viewed as having welcomed sexual harassment. This interpretation hinders efforts to rid the workplace of harassment by preventing valid claims from moving forward. Behavioral studies show that women are unlikely to behave confrontationally when harassed, but instead attempt to tolerate or ignore the conduct.<sup>198</sup> Such a requirement for establishing unwelcomeness contradicts typical behavior by seeking evidence that the employee outwardly expressed unfriendliness.

Evidence that conduct was not unwelcome is frequently gleaned from the woman’s treatment of the harasser, with signs of friendship, openness, or even ambivalence about the relationship interpreted as welcoming sexual overtures. Courts have considered the fact that a woman frequently had lunch with a supervisor and “discussed personal matters” as constituting evidence that sexual advances were not unwelcome.<sup>199</sup>

194. *Id.* at \*6.

195. *Id.* at \*7.

196. *See* Weiner, *supra* note 74, at 630 (noting cases where courts have found “a woman’s having lunch with a man, visiting a man in the hospital, and kissing a man on the cheek in a posed snapshot relevant to the question of whether a woman has invited subsequent harassment and even attempted sexual assault”).

197. *See* Barbara A. Gutek & Bruce Morasch, *Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. OF SOC. ISSUES 55, 58–59 (1982). In an effort to obtain or preserve social acceptance, women typically fulfill the stereotypical female role. *Id.*

198. *See, e.g.*, Gruber & Smith, *supra* note 151, at 544–46 (citing studies concluding that most women do not respond assertively to or formally report harassment, but that instead they incorporate various strategies for tolerating it).

199. *See* Kresko v. Rulli, 432 N.W.2d 764, 768 (Minn. Ct. App. 1988). Other evidence relied on by the trial and reviewing courts, including that the employee wrote a note struggling to define their relationship as involving love or mere



In addition, a woman who does not convey a requisite level of shock at the harassing conduct may be deemed to have experienced conduct that is not unwelcome. One Minnesota court found that a woman who managed to retain her composure in the face of harassment, instead of outwardly expressing shock or horror, had not experienced unwelcome conduct.<sup>200</sup> The trial court found that her “comments evinced a sense of humor and perspective about the parties that belied her claim of sexual harassment.”<sup>201</sup>

Some courts have interpreted this requirement as necessitating that the harassed employee made some very clear response, after the fact, to inform the harasser that the conduct was not wanted.<sup>202</sup> The state agency in charge of investigating discriminatory employment practices also appears to countenance this idea.<sup>203</sup>

*e. Claims of Unwelcome Conduct as Mere Remorse or Ambivalence*

Several Minnesota decisions interject the notion that some sexual harassment claims are merely based on misgivings over what, at the time, were welcome advances.<sup>204</sup> This line of thinking brings with it the underlying mythology that there is a prevalence of fraudulent sexual harassment claims. In *Miles v. DDF, Inc.*, a woman who claimed she was subjected to unwelcome sexual advances from her boss was found to have been a “willing and active participant” in sexual conduct, and her claim was found to be based on regret and her likely honest belief that she had been

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friendship, shows less of a non-progressive bias. *Id.* at 766.

200. *Petrovic v. Ridgeview Country Club*, No. C6-01-1474, 2002 WL 765490 (Minn. Ct. App. Apr. 24, 2002).

201. *Id.* at \*3.

202. See Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 516 (1994) (discussing *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456 (7th Cir. 1990)).

203. See *Klinghagen v. Setterberg*, Nos. C6-97-1744, CX-97-1293, 1998 WL 249028, at \*2 (Minn. Ct. App. May 19, 1998) (noting that, according to the Minnesota Department of Human Rights, unwelcomeness was unlikely to be established because the employee did not let the harasser know his conduct was unwelcome).

204. See Bernstein, *supra* note 83, at 500 (stating that “as many commentators argue, the rule about ‘welcomeness’ is akin to the common law belief that rape claims are often lies that are asserted to nullify past consent: according to the prejudice, a woman who is now a plaintiff or a prosecutrix was a willing participant when the conduct occurred”).

taken advantage of.<sup>205</sup> The implication, left unstated, is that her testimony that the advances were unwelcome was in fact dishonest. Omitted is an analysis of whether what she regretted was really her acquiescence to her boss's uninvited and unwelcome advances.<sup>206</sup> In another case where the plaintiff was found unable to establish unwelcome conduct, the court characterized the plaintiff as considering the advances "unwelcome in retrospect."<sup>207</sup>

A second theme that should also be noted is the notion that the harassed employee's mixed or ambivalent feelings about the harasser preclude a finding of unwelcomeness. One Minnesota court was comfortable affirming a finding that no sexual harassment occurred because the evidence indicated that either the employee welcomed her supervisor's advances, or she had "ambivalent feelings" about them.<sup>208</sup>

More progressive developments in the law would find that an employee who is ambivalent about sexual conduct in the workplace has not sufficiently invited or solicited the conduct for it to be deemed welcome. Determinations of whether particular conduct was unwelcome would not devolve into speculation about whether the claim was brought because an employee now regretted being taken advantage of by her boss.

## 2. *Complaint as the Sine Qua Non – Behavioral Assumptions Not Borne Out by Research*

Although an employee is not required to complain about the conduct in order to establish that sexual harassment has occurred,<sup>209</sup> assessment of unwelcomeness in the courts is frequently tied to whether the employee complained and, if so, to

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205. No. EM 02-20129, 2004 WL 3563777, at \*3 (Minn. Dist. Ct. Dec. 30, 2004).

206. *Id.*

207. *Halvorson v. Consecro Fin. Corp.*, No. Civ. 011774RHKAJB, 2002 WL 31371938, at \*8 (D. Minn. Oct. 21, 2002).

208. *Kresko v. Rulli*, 432 N.W.2d 764, 768 (Minn. Ct. App. 1988).

209. However, where an employer provides an internal complaint process, an employee may be required to attempt to use it in order to impose liability on the employer. See Linda Hamilton Krieger, *Employer Liability for Sexual Harassment – Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 170–71, 175 (criticizing the affirmative defense recognized by the Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) where an employee does not use an employer's internal complaint procedures).

whom.<sup>210</sup> An additional assumption, often affirmed in the law, is that if conduct is truly unwelcome, the complaint will be made in a direct manner using formal procedures.<sup>211</sup> Failure to complain, complaining long after the harassing events have occurred,<sup>212</sup> or raising the issue in an indirect manner<sup>213</sup> are thus considered evidence that the conduct was welcome.

Women, however, usually do not complain when they experience sexual harassment at work.<sup>214</sup> Additionally, the racial status and cultural background of the parties involved may make it less likely that the woman will complain.<sup>215</sup>

Minnesota courts show signs of clinging tightly to the notion that if the conduct was truly unwelcome, the employee would have formally complained to the employer. In one case, an intern asserted that her supervisor was harassing her by commenting on how she looked in a sweater, by physically attacking her while they were at her house for lunch, and by engaging in “mutual kissing and petting.”<sup>216</sup> The Minnesota Court of Appeals affirmed a verdict

210. See *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 632 (8th Cir. 2000) (finding that when plaintiff failed to complain about the conduct, it was not determined to be unwelcome); Fitzgerald, *supra* note 137, at 100–01 (“[M]aking a formal complaint appears to be the legal sine qua non of an ‘appropriate’ response.”).

211. See, e.g., *Paraohao v. Bankers Club, Inc.*, 225 F. Supp. 2d 1353, 1360 (S.D. Fla. 2002). (determining that conduct was not unwelcome in part because complaint was made informally, to a co-worker, and that initial, more formal discussions with management left out certain details); *Weinsheimer v. Rockwell Int’l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (providing that conduct was not unwelcome in part because plaintiff reported harassment in casual conversation with supervisor), *aff’d*, 949 F.2d 1162 (11th Cir. 1991); *Kouri v. Liber. Servs., Inc.*, Civ. A. No. 90-00582-A, 1991 WL 50003, at \*7–8 (E.D. Va. Feb. 6, 1991) (noting that plaintiff failed to report harassment through formal channels), *aff’d*, 960 F.2d 146 (4th Cir. 1992).

212. See *Paraohao*, 225 F. Supp. 2d at 1360 (finding that conduct was not unwelcome as a matter of law in part because the plaintiff did not complain until nearly four months after she started working with the harasser); *Weinsheimer*, 754 F. Supp. at 1564 (finding that conduct was not unwelcome where reported months afterwards); *Vermett v. Hough*, 627 F. Supp. 587, 608 (W.D. Mich. 1986) (holding that a three-month delay in reporting did not support actionable harassment).

213. See *Weinsheimer*, 754 F. Supp. at 1564 (focusing on the delay and the fact that plaintiff reported the harassment via informal conversations with supervisors without appearing troubled).

214. Marshall, *supra* note 151, at 86 (citing numerous articles and studies finding that women tend to refrain from complaining about sexual harassment).

215. Crenshaw, *supra* note 82, at 421–22, 424–27 (stating that the camaraderie grounded in a shared history of social exclusion “make[s] many black women reluctant to complain about or even to decisively reject the [black] harasser”).

216. *Kresko v. Rulli*, 432 N.W.2d 764, 766–68 (Minn. Ct. App. 1988).

for the defendant employer, noting in part that the woman had only complained about her supervisor's conduct to another intern and to her daughter.<sup>217</sup>

Although there was other evidence impacting the determination of whether the conduct was unwelcome,<sup>218</sup> the appellate court focused on the intern's failure to complain, noting that this intern showed signs of being quite assertive in other aspects of her life, with no empathy for how experiencing sexual harassment in the context of a career path might create different barriers to reporting.<sup>219</sup> In the end, the appellate court stated "[t]he logical conclusion is that [the intern] did not complain because either the advances were welcome, or at least she had ambivalent feelings."<sup>220</sup> Here, the court's opinion actually requires the intern to overcome a presumption that having mixed feelings about her supervisor necessarily translated into welcoming his sexual advances.<sup>221</sup>

Even where a decision is sympathetic to the idea that women who have been harassed at work do not always formally complain, traces of the inclination to favor those who report over those who do not remain. In one instance, an employer argued that a finding of unwelcome conduct, where the employee had not formally complained, should be overturned on appeal.<sup>222</sup> The appellate court deferred to the findings of fact made by the trial court, which found that, among other things, the employee believed that ignoring her boss's behavior communicated that the conduct was not welcome.<sup>223</sup> In upholding the judgment of harassment, however, the appellate court also placed significance on the fact that the employee later directly told her boss that she was not being paid to tolerate his harassment.<sup>224</sup> Favoring complainers over non-

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217. *Id.* at 768.

218. Other facts supporting the trial court's decision included the two having lunch together frequently and discussing personal issues, the intern writing her supervisor a note expressing affection for him and reservations about the fact that he was married, the two having several kissing and petting sessions, and that the intern selected this internship knowing that this particular man would be her supervisor. *Id.*

219. *Id.*

220. *Id.*

221. This attitude resonates with the theme of regret noted above.

222. *Hansen v. Regency Corp.*, No. C6-95-962, 1996 WL 33116, at \*1-2 (Minn. Ct. App. Jan. 30, 1996).

223. *Id.* at \*2.

224. *Id.* at \*1.

complainers in determining whether conduct qualifies as unwelcome places the majority of female employees at a disadvantage in establishing sexual harassment.

The idea that real harassment always prompts complaints about the conduct is so entrenched that courts have pondered whether establishing unwelcomeness requires repeated reports when the conduct continues to occur.<sup>225</sup> Even the rare female employee who repeatedly complains about ongoing harassment is rewarded, not with a determination that the conduct was unwelcome as a matter of law, but with the opportunity to present her case to a jury.<sup>226</sup> Employees who do not have the social or financial wherewithal to complain, confront, or quit would presumably receive a less favorable decision.

In only one instance did a court express doubts about the validity of the presumption that women complain when conduct is unwelcome.<sup>227</sup> In that case, the employee never told her supervisors that their conduct was unwelcome, but instead responded to their behavior with silence, terse disapproval, or blushing.<sup>228</sup> In holding that the issue of unwelcomeness was clearly one of fact and denying the employer's request for judgment as a matter of law, the court noted that she may have refrained from complaining as a result of the power disparity between herself, a secretary, and the harassers, who were high-level administrators for her employer.<sup>229</sup> Progressive treatment of unwelcomeness should reveal, at a minimum, this level of awareness.

A truly progressive interpretation would incorporate developments in the understanding of women's behavior by

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225. Hansen v. Genuine Parts Co., No. CIV.00-16DWFAJB, 2001 WL 586722, at \*4 (D. Minn. May 29, 2001) (fleeting analysis of whether plaintiff had to keep complaining in order to establish unwelcomeness; plaintiff survived summary judgment; a jury should determine whether failing to continue reporting specific incidents was reasonable in light of the employer's lack of response to her initial complaints).

226. Myers v. State, No. C4-99-855, 2000 WL 2620, at \*2 (Minn. Ct. App. Jan. 4, 2000). In reversing summary judgment, the evidence that impressed the court as demonstrating that the conduct was unwelcome was the employee's repeated oral complaints about the conduct, negative reactions to harassing co-workers, and ultimate resignation from the job. *Id.*

227. Dull v. St. Luke's Hosp. of Duluth, 21 F. Supp. 2d 1022, 1024 (D. Minn. 1998). The employer sought summary judgment, alleging among other things that the employee had failed to signal that the conduct of her bosses was unwelcome. *Id.*

228. *Id.*

229. *Id.* at 1025.

discounting or discarding the notion that a formal, timely complaint is the best evidence of unwelcomeness or that the lack of a complaint shows that conduct was welcome. The state and federal courts of Minnesota have not produced opinions that promote much, if any, progress in this area.

#### IV. CONCLUSION

A progressive agenda as to the element of unwelcome conduct is not hard to articulate: outdated insinuations about what it means when women work outside the home and how women should behave with regard to sexuality should be rejected. The descending hierarchy of protection from workplace harassment, in which women who are more sexually expressive or experienced are less entitled to object to harassment, should be eliminated. Evidentiary presumptions based on long-since debunked theories about how women react to sexual harassment should be set aside and replaced with an interpretation of unwelcome conduct that requires more from the defendant and less from the plaintiff.

Minnesota courts have not been as proactive as they could be in identifying and criticizing efforts to infuse the unwelcomeness inquiry with outdated stereotypes and assumptions about proper female sexual behavior. Drawing the lines more clearly would provide complaining employees with more basis for assessing the risk of enduring “a second rape”<sup>230</sup> and force defendants to rethink efforts to play on bias and sexism to embarrass the plaintiff and win over the finder of fact. Although the analysis will continue to be conducted on a case-by-case basis, explicit warnings from courts are needed to guide the conduct of the parties, the advice of counsel, and to otherwise create a framework of expectations as to how these aspects of human behavior will be treated by today’s courts. Such efforts comport with the progressive agenda of improving access to justice for those who tend to be underrepresented and disempowered by the legal system and, ultimately, of changing the underlying societal attitudes to promote social justice.

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230. See MADIGAN & GAMBLE, *supra* note 105, at 3 (analyzing the ways in which “women who report rape are again raped by a system composed of well-intentioned people who are nevertheless blinded by the myths of centuries”). Sexual harassment litigation has permitted similar abuses of civil complainants. *Id.*